DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-7515
Title: Marcus Andrew Burrage, Petitioner
v.
United States
Docketed: November 30, 2012
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (11-3602)
Decision Date: August 6, 2012
Rehearing Denied: September 13, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 27 2012	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 2, 2013)
Dec 5 2012	Waiver of right of respondent United States to respond filed.
Dec 13 2012	DISTRIBUTED for Conference of January 4, 2013.
Dec 27 2012	Response Requested . (Due January 28, 2013)
Jan 23 2013	Order extending time to file response to petition to and including February 27, 2013.
Feb 15 2013	Order further extending time to file response to petition to and including March 29, 2013.
Mar 26 2013	Brief of respondent United States in opposition filed.
Apr 3 2013	Reply of petitioner Marcus Andrew Burrage filed. (Distributed)
Apr 11 2013	DISTRIBUTED for Conference of April 26, 2013.
Apr 29 2013	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Questions 1 and 2 presented by the petition.
May 9 2013	Motion to appoint counsel filed by petitioner Marcus Andrew Burrage.
Jun 6 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 19, 2013.
Jun 6 2013	The time to file respondent's brief on the merits is extended to and including September 20, 2013.
Jun 10 2013	Motion DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	Motion to appoint counsel filed by petitioner GRANTED. Angela L. Campbell, Esquire, of Des Moines, Iowa, is appointed to serve as counsel for the petitioner in this case.
Jul 19 2013	Joint appendix filed. (Statement of costs filed.)

Jul 19 2013	Brief of petitioner Marcus Andrew Burrage filed.
Jul 26 2013	Brief amicus curiae of Families Against Mandatory Minimums filed.
Jul 26 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Tuesday, November 12, 2013.
Sep 12 2013	The time to file respondent's brief on the merits is further extended to and including October 1, 2013.
Sep 13 2013	Record received from U.S.C.A. for 8th Circuit. (1 box)
Sep 17 2013	Record from U.S. District Court, Southern Dist. of Iowa is electronic.
Sep 17 2013	Exhibits received from U.S.D.C. of Iowa. Paper and CD exhibits. (1 box)
Oct 1 2013	Brief of respondent United States filed. (Distributed)
Oct 8 2013	Brief amici curiae of Alaska, et al. filed. (Distributed)
Oct 31 2013	Reply of petitioner Marcus Andrew Burrage filed. (Distributed)
Nov 12 2013	Argued. For petitioner: Angela L. Campbell, Des Moines, Iowa (Appointed by this Court.) For respondent: Benjamin J. Horwich, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12-7515

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Burrage,

Petitioner,

-vs.-

United States of America,

Respondent.

SUPREME COURT, U.S.
FILED
NOV 27 2012
OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals

Petition for Writ of Certiorari

Angela L. Campbell
Dickey & Campbell Law Firm, PLC.
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@dickeycampbell.com

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.
2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the sole cause of death of a person.
3. Whether an officer can testify that the defendant is a "known" heroin dealer because the officer couched it as necessary to explain why he put the defendant's picture in a photo lineup.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES 3

OPINION BELOW 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 12

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE CRIME OF DISTRIBUTING DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A FORESEEABILITY OR PROXIMATE CAUSE REQUIREMENT 12

II. THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT YET BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 13

A. The Supreme Court should intervene and correct the Eighth Circuit's holding that a conviction for distribution of heroin causing death can be sustained when the heroin was merely a "contributing cause" of the death by mixed drug intoxication, rather than the sole cause of the death 13

B. The Supreme Court should step in and fix the Eighth Circuit's decision that an officer can testify during trial that a defendant is a "known heroin dealer" as a reason for putting the defendant's picture in a photo lineup 16

CONCLUSION 18

APPENDIX

8th Circuit Opinion filed August 6, 2012 22

Order denying rehearing and rehearing en banc filed on September 13, 2012.....

TABLE OF AUTHORITIES

Cases Pages

United States Supreme Court

Greer v. United States, 245 U.S. 559 (1918).....17

Michelson v. United States, 335 U.S. 469, 475-76 (1948) 17

Staples v. United States, 511 U.S. 600, 604 (1994).....12

United States v. United States Gypsum Co, 438 U.S. 422, 436-37 (1978).....12

United States Court of Appeals

United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011).....14

United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010). 12, 13, 14, 15, 16

United States v. McIntosh, 236 F.3d 968 (8th Cir. 2001) 11, 12

United States v. Monnier, 412 F.3d 859, 862 (8th Cir. 2005) 12, 14

United States v. Moorehead, 57 F.3d 875 (9th Cir. 1995).....17

United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994).....16

United States v. Rodriguez, 524 F.2d 485 (5th Cir. 1975).....17

United States v. Walker, 636 F.2d 194, 195 (8th Cir. 1980),.....16

United States Constitution and Statutes

21 U.S.C. § 841(b).....13

Federal Rule of Evidence 801.....

Other

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2011).....14

OPINION BELOW

The petitioner, Marcus Burrage, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 09-2568 entered on August 6, 2012, and made final with the denial of rehearing and rehearing en banc on September 13, 2012. *United States v. Burrage*, 687 F.3d 1015 (8th Cir. 2012).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on August 6, 2012. The petitioner's petition for rehearing and rehearing en banc was denied on September 13, 2012. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(b)(1)(C) states:

> In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of

imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C.A. § 841(b)(1)(C).

Federal Rule of Evidence 801 states:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(C) identifies a person as someone the declarant perceived earlier.
(2) An Opposing Party's Statement. The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Fed. R. Evid. 801

STATEMENT OF THE CASE

On April 27, 2011, a federal grand jury returned a two-count superseding indictment against Burrage, charging him with one count of distribution of heroin and one count of distribution of heroin causing death. (CR 26).

Count I, distribution of heroin stemmed from a controlled sale of heroin to an informant, Breanne Brown. (TT 90-91).

Count II, distribution of heroin causing death, stemmed from the death of Joshua Banka after Banka executed a planned bender of various illegal drugs. (TT 278). The government's two experts testified the cause of Banka's death was not heroin overdose, but instead was "mixed-drug intoxication." Banka was a life-long multi-drug user with extensive pending legal problems, mental health issues, a history of suicidal behavior, and hospitalizations for drug overdoses. (TT 253-54, 261). Banka's wife, Tammy Noragon, also an extensive drug user, testified Banka had struggled with drug abuse since he was 17 years old. (TT 184). He used marijuana, OxyContin, crack, heroin, and prescription drugs. (TT 184-85). Noragon said Banka started using heroin in September of 2009 until October of 2009, and was using heroin, crack and OxyContin daily. (TT 185). Despite evidence to the contrary, Noragon testified that Banka abruptly stopped using heroin in October of 2009 and didn't use again until the day of his bender, on April 13, 2010, before his death on April 14, 2010. (TT 185). Banka had continued to use marijuana, Clonzaepam, Xanax, OxyContin, Lortab and other illegal substances daily throughout this time period. (TT 186, 221-24). Banka was also stealing OxyContin when he could not buy it. (TT 225).

On March 3, 2010, Banka got arrested after crashing his car on Interstate 35 and was charged with OWI and possession of marijuana. (TT 186). Two weeks later, he was again

driving drunk and had to be stopped by a spike stick when he ran from the police. (TT 187). Banka was charged with felony eluding, marijuana possession, resisting arrest and disorderly conduct. (TT 187). As a result of his arrests, Banka did a substance abuse evaluation, which recommended he go into intensive outpatient treatment with daily meetings to address his drug addiction and mental health issues. (TT 188). On April 13, 2010, despite Banka's pending dual criminal matters, and despite his imminent substance abuse treatment program, Noragon and Banka decided that Banka would have one last bender of drug use. (TT 192-93). Noragon drove him around during this bender. (TT 193-94).

Early in the day on April 13, Banka stole Percocet and OxyContin from an acquaintance and used the drugs. (TT 208, 251). Banka and Noragon, apparently dissatisfied with their stolen loot, then started texting Marcus Burrage. Noragon testified that they went to buy heroin from Burrage at a Hy-Vee parking lot in Ames, Iowa. Noragon said that they then drove a block and a half away and Banka shot up alone, even though he was no longer addicted to heroin and supposedly had not used for six months. (TT 198, 240-41). Noragon said she then drove Banka home, where he shot up heroin again between 12:00 a.m. and 1:00 a.m. (TT 201). At 3:00 a.m. and 5:00 a.m. he went to the bathroom again to use more drugs. (TT 201-03). At 10:30 a.m., Noragon found Banka dead in the bathroom and called law enforcement. (TT 204). Noragon could tell Banka had come into the bedroom and left again after 5:00 a.m., but didn't know what drugs he had used at that point right before he died. (TT 251).

Noragon said the OxyContin found in the house Banka had gotten "from someone else" other than Burrage. (TT 207). Noragon said that there would be a full syringe in the car with heroin, and "maybe" some OxyContins. (TT 210-11). Banka ingested the OxyContins and the heroin both by syringe.

When officers arrived, Banka was already dead. (TT 127). There was a syringe in the bathroom sink with a baggie lying next to it, containing heroin. (TT 127, 136). There were three empty syringes, one full syringe and a bag of unused syringes in the vehicle. (TT 136.) There was a bottle of Baclofen prescribed to David Letsch, a bottle of clonazepam, alprazolam, a bottle of hydrocodone, and Oxycodone tablets. (TT 136, 154). There were three syringes and three unused syringes in the bathroom. (TT 136). There was a Mountain Dew can and a marijuana bong in the house. (TT 136). Also, there was a baggie of other narcotics found in the vehicle, which while recorded in some of the reports, officers failed to identify what controlled substance was found in the vehicle. (TT 144, 169). One officer knew it to contain suspected narcotics, though those narcotics were never submitted to a lab or recorded on the property inventory. (TT 327, 332).

At trial, Burrage testified he met Banka and Noragon in February of 2010, not in April of 2010 as Noragon stated. (TT 364). Also contrary to Noragon's testimony, Burrage testified he had seen Noragon use heroin and had seen Banka use OxyContin and heroin because he had used with them in the past. (TT 364). He testified that he did meet them in the HyVee parking lot on August 13, but he met them to trade OxyContin pills to Banka for heroin that Banka had. (TT 366). Burrage testified he traded five OxyContin pills for a half gram of heroin. (TT 368). Burrage testified that Banka was already high when he met the couple in the Hyvee parking lot. (TT 368.)

At trial, the government called two experts, Dr. Jerri McLemore and Dr. Eugene Schwilke. McLemore was a medical doctor who was employed by the State of Iowa as a Medical Examiner at the time of Banka's death. (TT 257-58). Schwilke was a toxicologist from AIT Laboratory. (TT 269).

McLemore had performed the autopsy of Banka on April 16, 2010. (TT 258). She testified Banka had aspirated on his own vomit. (TT 264). She noted he had scarred vessels in his arms, indicating a long history of intravenous drug use. (TT 265-66). She also saw other indications that Banka was injecting drugs into other areas of his body, and had developed a condition in his lungs, both of which indicated long-term intravenous drug use. (TT 266, 277). McLemore also noted that Banka had heart disease and his heart was twice the size and weight of a normal man's heart. (TT 267). McLemore and Schwilke both evaluated the test results of Banka's comprehensive drug panel.

In reference to the results of the blood panel, McLemore stated,

> Values – or drugs that were detected were sorts of benzodiazepines, such as clonazepam and alprazolam. The breakdown of marijuana was found. There were a number of opiates, such as Oxycodone, which is a prescription medication, and morphine…
>
> Morphine, again, is an opiate. It's a narcotic. Many drugs that are morphine based, drugs for even prescription medications will show up as morphine. Heroin will break down into morphine, and it may not be possible to distinguish between morphine from heroin versus morphine from, say, morphine sulfate that you get as a prescription medication. However, heroin will first break down into something called 6-Monoacetylmorphine, 6-MAM for short. When 6-Monoacetylmorphine is also present in the blood, then that came – the morphine you're seeing came from heroin…

(TT 270-71).

When asked what the levels found in Banka's blood indicated, McLemore stated,

> First of all, the fact that the 6-MAM is there, to me, is more significant, again, because that helps me determine that the morphine I'm seeing was derived **at least in part** by heroin. As far as the level of the morphine, the morphine was at a significantly high level, at a level higher than what the published reference range for a therapeutic dose was given.

(TT 273, emphasis added). McLemore went on to testify that the morphine range in Banka's system was 2 ½ times higher than the top of the therapeutic range. (TT 274). The morphine,

which could be developed by both the oxycodone and the heroin, was the only drug in his system above the therapeutic range. (TT 278). She explained that the use of any of the opiates creates a tolerance to the other opiates, which can affect the significance of the therapeutic range. (TT 289). Thus Banka's use of oxycodone created a tolerance to the use of heroin. (TT 289).

McLemore's final conclusion was that the cause of death was a "mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." (TT 278). She stated that in her opinion, that the circumstances of the case were "consistent with those drugs, including the heroin, as contributing to death." (TT 278-79).

Medically, a "cause of death" is a disease or disease processes or injury that brought about the death of a person. (TT 279). A "contributory" is a disease, disease process, or injury that aided in bringing about the death of a person. (TT 279). The difference between the two is causation – a "contributory" cause means that it is not necessarily true that a person would not have died but for that cause. (TT 279-80). Specifically, McLemore testified that she could not say that had Banka not taken the heroin he would not have died. (TT 280, 293). Had she made that finding, she said her report would have read "heroin overdose" rather than "mixed drug intoxication." (TT 280). Specifically, other contributory causes to Banka's death were oxycodone, benzodiazepines, and marijuana. (TT 280-81). McLemore could not determine which drug caused Banka to aspirate. (TT 281). She could not tell what caused him to vomit. (TT 287-88). And she could not say that had he not used oxycodone he would not have died. (TT 291).

The toxicologist, Dr. Schwilke, testified that "every drug on this list" in Banka's system, with the exception of marijuana, had a central nervous system depressant affect. (TT 300). In his opinion the slowed breathing process, also called respiratory depression, is a common toxic

effect when multiple central nervous system depressant medications are combined together. (TT 300). Schwilke also explained that the "therapeutic range" would not necessarily apply to someone who has developed a tolerance for a certain type of drug. (TT 301). Schwilke could determine that marijuana was smoked within the last several hours prior to death – a fact that demonstrated Noragon's testimony was inaccurate. (TT 307-08). Schwilke also explained that the level of "201 nanograms per milliliter" that had been utilized by the government to say Banka's heroin use level was 2 ½ times greater than the therapeutic dose of 10-80 nanograms per milliliter was like "compar[ing] apples to oranges." (TT 309). In his opinion, a 201 level for a regular user may not be toxic. (TT 310). He further verified that cross-tolerance from a regular oxycodone user, like Banka who was a daily oxycodone user, would develop and raise the tolerance level. (TT 311). Like McLemore, Schwilke could not say that if Burrage had not taken the heroin he would not have died, or if he had not taken the oxycodone, he would not have died. (TT 316).

At trial, Burrage submitted jury instructions requiring a foreseeability element, requesting a "proximate cause" instruction and and objected to the use of "contributing cause." He also objected, unsuccessfully, to a law enforcement officer testifying that he was a "known heroin dealer." On August 6, 2012, the Eighth Circuit affirmed Burrage's conviction, stating that the district court's use of "contributing cause" in the jury instructions was appropriate under *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), that there was no foreseeability or proximate cause element for conviction, and noted that only the court sitting en banc can overrule the Circuit's prior opinion in *McIntosh*. (Opinion at 6-7). The panel further held that even if the district court erred in admitting the officer's testimonial hearsay in violation of Rule 404(b), the error was harmless.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE CRIME OF DISTRIBUTING DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A MENS REA, FORESEEABILITY, OR PROXIMATE CAUSE REQUIREMENT.

The US Supreme Court has been clear that "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples v. United States*, 511 U.S. 600, 604 (1994); *United States v. United States Gypsum Co*, 438 U.S. 422, 436-37 (1978). Even when a statute does not include terms of *mens rea* within in, the Supreme Court tells lower courts that "offenses that require no *mens rea* generally are disfavored," and courts should look for some indication of congressional intent before *mens rea* is dispensed as an element of a crime. *Staples*, 511 U.S. at 604.

Despite these instructions from the Supreme Court, the Eighth Circuit continues in the instant case to hold that the "death resulting" language under 21 U.S.C. section 841(b) creates a strict liability crime, in which the court may not impose a foreseeability or proximate cause requirement. *See also United States v. Monnier*, 412 F.3d 859 (8th Cir. 2005) (proximate cause is not required for a conviction under 841(b)); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) (death need not be reasonably foreseeable to the defendant under 841(b)). However, the Seventh Circuit has recently expressed reserve about the "strict liability" interpretation of the "death resulting" element. *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In the Seventh Circuit opinion, Judge Posner stated that the strict liability interpretation "could lead to some strange results." Judge Posner interpreted the other circuits' use of strict liability to mean "simply the omission of any reference to foreseeability or state of mind." *Hatfield*, 591 F.3d at 950. However, because the defendants in the *Hatfield* case did not challenge the interpretation of

the statute as imposing strict liability on them for death or injury to the recipients of their drugs, the circuit court did not reach the issue of whether the "death results" element creates strict liability. *Id.*

In his opinion, Judge Posner gave examples of strange results that may occur due to the lack of a foreseeability or proximate cause requirement. For instance, if a defendant sells an illegal drug to a person who ingests it in a bathroom, and while in the bathroom, the ceiling collapses and kills him, strict liability could support a conviction. As Judge Posner reasoned, had the person not ingested the drug, he would not have been in the bathroom and would not have been crushed under the falling ceiling – but it would be "strange" to think that the seller of the drug was punishable under 21 U.S.C. § 841(b)(1)(C). *Id.* at 948. Another "strange result" could occur when, unbeknownst to the seller of an illegal drug, the buyer was intending to commit suicide by taking an overdose of drugs, bought from the seller, that were not abnormally strong, and the seller had informed the buyer of the strength of the drugs so that there was no reasonable likelihood of an accidental overdose. *Id.* at 950.

Burrage was convicted of a strict liability homicide count without a proximate cause, foreseeability, or *mens rea* requirement. His conviction should not stand and the Supreme Court should intervene.

II. THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT YET BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Supreme Court should intervene and correct the Eighth Circuit's holding that a conviction for distribution of heroin causing death can be sustained when the heroin was merely a "contributing cause" of the death by mixed drug intoxication, rather than the sole cause of the death.

The Eighth Circuit has read "contributing cause" into 21 U.S.C. §841(b)'s and its inclusion raises a question of exceptional importance. While the 8th Circuit has stated that the

"contributing cause" instruction is consistent with § 841(b)(1)'s "results from" requirement, there is a circuit split on this question. *See United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In *Hatfield*, the Seventh Circuit expressly rejected a jury instruction adopting the "contributing cause" language from *Monnier* and instead endorsed a jury instruction using the statute's language without embellishment. *Id.* at 947-51. The 2011 edition of the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* does not include any embellishing language to define the "death resulting" element.

In the instant case, in addition to denying Defendant's proposal of the criteria of proximate cause for establishing the "death resulting" element, the Eighth Circuit approved an embellishment of the "death resulting" requirement by inserting "contributing cause" as the standard, triggering the concerns prevalent in Judge Posner's decision in *Hatfield*. The government cited as its authority for the instruction the Eighth Circuit's decision in *United States v. Faulkner*, 636 F.3d 1009 (8th Cir. 2011). *Faulkner* does not hold, however, that the language "contributing factor" is required to be included in the jury instructions. *Faulkner*, 636 F.3d at 1012 ("[t]he jury also found that the Government proved beyond a reasonable doubt that heroin distributed pursuant to the conspiracy in count one was a *contributing factor* in the death of a third party and that the death was reasonably foreseeable to Faulkner") (emphasis added). Nor does the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, promulgated in 2011, require the use of any embellishing language to define the "death resulting" element. Instead, the Eighth Circuit has continued with this instant case, down the path of creating a completely new type of homicide crime – one that Congress did not intend and this Court should not allow.

Illinois's U.S. Attorney's office had previously tried a similar maneuver to make it easier to convict a defendant under 21 U.S.C. §841(b), as evidenced within the Seventh Circuit's opinion in *Hatfield*. In *Hatfield*, the government had embellished the jury instruction on "death resulting" by stating that "the controlled substances distributed by the defendants had to have been 'a factor that resulted in death or serious bodily injury,' and that although they 'need not be the primary cause of death or serious bodily injury' they 'must at least have played a part in the death or in the serious bodily injury.'" *Hatfield*, 591 F.3d at 947. The defendants' attorney objected to the addition as a confusing gloss, but the district judge refused to remove the addition. *Id.* The court of appeals reversed, holding that there was error in the instruction and it was not harmless. *Id.* at 951. The court stated that it did not understand "what a jury would make of 'primary cause' and 'played a part.' *Id.* at 949. The court also stated that "[a]ll that would have been needed to satisfy [the defendants' objection to the instruction] was to eliminate the addition to the statutory language, which was a good deal clearer than the addition and probably clear enough." *Id.* at 949.

Because the government succeed in Iowa the same thing it had failed in Illinois, we now have a circuit split on an important issue of federal law that the Supreme Court should step in and resolve.

Without the "contributing cause" embellishment to the jury instructions, there was insufficient evidence to justify a conviction of Burrage because under a traditional causation analysis, Banka's death did not, beyond a reasonable doubt, "result from" the use of heroin that he purchased from Burrage. The government's experts both testified that they could not say that Banka would not have died if he had not used heroin. (TT 280, 293, 316). By definition, this must mean that, under the law, his death did not "result" from the use of the heroin beyond a

reasonable doubt. Because there is certainly insufficient evidence to justify a conviction when taking this embellishment out of the jury instruction, a different jury instruction, one in line with the model instructions as well as *Hatfield*, would have certainly yielded a different conclusion in favor of Burrage. The Supreme Court should grant certiorari to fix this injustice.

B. The Supreme Court should step in and fix the Eighth Circuit's decision that an officer can testify during trial that a defendant is a "known heroin dealer" as a reason for putting the defendant's picture in a photo lineup.

A question of exceptional importance exists as to whether an officer can sneak in exceptionally prejudicial hearsay that a defendant is a "known heroin dealer" by pretending he needed to explain to the jury why he put the defendant's photo in a lineup. At Burrage's trial, Officer Miller explained, over objection, that Burrage was a known heroin dealer in the city, which is why he sent Burrage's photo to be included in the line-up.

Miller's testimony that Burrage was a known heroin dealer during a heroin distribution trial is not only classic hearsay, but exceptionally prejudicial. *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994), provides a framework for assessing the government's proffer of this type of background evidence and uses a two-part inquiry: (1) whether the non-hearsay purpose by which the evidence is sought to be justified is relevant; and (2) whether the probative value of this evidence for its non-hearsay purpose is outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement. This Court should adopt the *Reyes* framework for all of the Circuits and apply it in assessing Officer Miller's testimony in the instant case.

While witnesses' testimony about actions they took in response to a conversation is not necessarily hearsay, *see United States v. Walker*, 636 F.2d 194, 195 (8th Cir. 1980), the question and Miller's response was more than talking about his actions. The question asked *why* Miller

sent a photograph of Burrage, not *what* he did upon having conversations with the officers. Miller's explanation as to *why* he sent Burrage's photograph to another sergeant was in no plausible way relevant to the government's case. In addition any remote relevance was clearly outweighed by the danger of unfair prejudice, as the testimony essentially labels Burrage, who is on trial for selling heroin, as a heroin dealer. Accusing a defendant of being a drug dealer in front of a jury is extremely prejudicial and not harmless error. *See United States v. Moorehead*, 57 F.3d 875 (9th Cir. 1995) (possession of a firearm case was remanded for new trial after jury heard assertions that defendant was a drug dealer). A similar conclusion can be found in *United States v. Rodriguez*, 524 F.2d 485 (5th Cir. 1975), in which the court held that background tips should be excluded if they contain out-of-court statements that point directly to the defendant with a charge of crime, which can result in prejudicial error. As this Court has explained, this type of character evidence is excluded, not because it is not relevant, but because of a general distaste for propensity evidence in criminal cases.

> Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

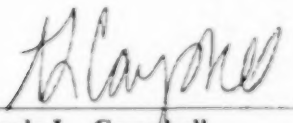
Michelson v. United States, 335 U.S. 469, 475-76 (1948).

This court should review Officer Miller's statements and issue a rule in accord with the Second and Fifth Circuits, determining that such background information is irrelevant and prejudicial. Certiorari should be granted on this issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



Angela L. Campbell
Dickey & Campbell Law Firm, PLC.
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@dickeycampbell.com

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Burrage,

Petitioner,

-vs.-

United States of America,

Respondent.

Appendix

Angela L. Campbell
Dickey & Campbell Law Firm, PLC.
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@dickeycampbell.com

ATTORNEY FOR PETITIONER

APPENDIX TABLE OF CONTENTS

1. *United States v. Burrage*, No. 11-3602 (8th Cir. Apr. 17, 2012)
Panel Opinion 21

2. *United States v. Burrage*, No. 11-3602 (8th Cir. Sept. 13, 2012)
Denial of Rehearing and Rehearing En Banc.....38

United States Court of Appeals
For the Eighth Circuit

No. 11-3602

United States of America

Plaintiff - Appellee

v.

Marcus Andrew Burrage

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: April 17, 2012
Filed: August 6, 2012

Before BYE, BEAM, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Marcus Andrew Burrage of distribution of heroin and distribution of heroin resulting in death, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). The district court[1] sentenced him to 240 months on each count,

[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

concurrently. Burrage appeals arguing the court erred by admitting hearsay testimony and denying his motions for judgment of acquittal and a new trial. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On November 17, 2009, Breanne Brown – a confidential informant – called Officer Jamie Miller of the Central Iowa Drug Task Force. She said she could purchase heroin that day from "Lil C." Later that day Brown – who was cooperating with law enforcement after being found in possession of marijuana – conducted a controlled buy of heroin from Lil C. Officer Miller watched the buy. He testified at trial that he knew "Lil C" referred to Burrage and recognized him during the sale, but his written report did not list Burrage's name. An electronic device in Brown's purse recorded the transaction and transmitted the audio to the officers. The recording was played at trial. Burrage denied selling heroin to Brown and denied it was his voice on the recording.

Tammy Noragon Banka ("Noragon") testified that she accompanied her husband, Joshua Banka, as he purchased one gram of heroin from "Lil C" on April 14, 2010. Banka used some of the heroin almost immediately. He fell asleep and she helped him home. He woke up around midnight, using heroin then and again around 5:00 a.m., when Noragon went to sleep. Waking up around 10:30 a.m., she found Banka dead in the bathroom, seated on the toilet, slumped into the shower. She called the police. Officers from the Nevada (Iowa) Police Department and the Iowa Division of Criminal Investigations responded and investigated. They found drug paraphernalia and a number of narcotics and prescription medications, including alprazolam, clonazepam, oxycodone, baclofen, heroin, and marijuana. Noragon testified that Banka was a long-time, multiple drug user and that she saw him use marijuana and oxycodone the day before he died.

Believing Banka's death was related to heroin, the local officers contacted the Drug Task Force, providing them with Noragon's physical description of the person who sold heroin to her husband. Officer Miller sent Burrage's photograph. In a photo lineup conducted by local police, Noragon identified Burrage as the man who sold heroin to Banka. At trial, Noragon again identified Burrage as Lil C.

Dr. Eugene Q. Schwilke, a forensic toxicologist, conducted toxicology tests on Banka's blood and urine. His tests detected multiple drugs, including morphine (a metabolite[2] of heroin), 6-monoacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam, marijuana metabolites, and oxycodone. He testified that, in his opinion, heroin was a contributing factor to Banka's death, but he could not state that Banka would not have died if he had not taken heroin.

Dr. Jerri McLemore, with the State Medical Examiner's office, conducted Banka's autopsy. Relying on her physical examination of Banka and Dr. Schwilke's toxicology report, she certified the cause of death as "a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." She further testified, "The morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range." Dr. McLemore could not state that Banka would not have died if he had not taken heroin, but she did describe death without the heroin as "very less likely."

At the close of the government's evidence, Burrage orally moved for judgment of acquittal under Federal Rule of Criminal Procedure 29, challenging the sufficiency of the evidence to sustain a conviction on either count. The district court denied the

---

[2]Dr. Schwilke testified that a metabolite is what a drug breaks down into in the body.

motion. Burrage orally renewed the motion at the close of his evidence. The district court again denied the it.

The jury returned a guilty verdict on both counts. Burrage moved for a new trial under Federal Rule of Criminal Procedure 33, alleging erroneous jury instructions and prosecutorial misconduct. The district court denied the motion.

II.

Burrage appeals the district court's denial of his motion for new trial. This court reviews the denial of a motion for new trial for an abuse of discretion. ***United States v. Louper-Morris***, 672 F.3d 539, 559 (8th Cir. 2012). "Reversal of a denial of a motion for new trial is rare." ***Id.***, *quoting* ***United States v. Perez***, 663 F.3d 387, 391 (8th Cir. 2011).

A.

Burrage challenges the jury instructions related to 21 U.S.C. § 841(b)(1)(C), a penalty provision that increases the minimum sentence for distribution of heroin "if death or serious bodily injury *results from* the use of such substance." (emphasis added). The district court instructed the jury:

INSTRUCTION NO. 10
ELEMENTS OF THE OFFENSE – COUNT TWO –
DISTRIBUTION OF HEROIN RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count Two of the Indictment, has three essential elements, which are:

1. On or about April 14, 2010, the Defendant intentionally distributed heroin; and
2. At the time of the transfer, the Defendant knew that it was heroin; and

3. A death resulted from the use of the heroin.

For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death[.]

For you to find the Defendant guilty of the crime charged under Count Two the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of this crime under Count Two.

"This court reviews a district court's jury instructions for abuse of discretion and its interpretation of law de novo." ***Kahle v. Leonard***, 563 F.3d 736, 741 (8th Cir. 2009). This court will affirm where the instructions, "taken as a whole, . . . fairly and adequately instruct the jurors on the applicable law." ***United States v. Spires***, 628 F.3d 1049, 1053 (8th Cir. 2011) (internal quotation marks and citations omitted). "Notably, a defendant is not entitled to a particularly worded instruction." ***Id.*** alterations and internal quotation marks omitted). This court "will reverse only if an error in the instructions was prejudicial." ***United States v. Yielding***, 657 F.3d 688, 708 (8th Cir. 2011).

1.

Burrage argues that "results from" in § 841(b)(1)(C) requires a showing of "proximate cause." At trial he requested three jury instructions to that effect.[3] "A

---

[3]Burrage's Proposed Jury Instruction No. 13:

ELEMENTS OF THE OFFENSE – COUNT TWO – DISTRIBUTION OF HEROIN RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count 2 of the indictment, has three elements, which are:

defendant is entitled to a proposed instruction that conveys the substance of his request if it is supported by the evidence in the case and is a correct statement of the law.'" ***United States v. Petters***, 663 F.3d 375, 384 (8th Cir. 2011) (internal quotation marks and alterations omitted), *quoting* ***United States v. Gary***, 341 F.3d 829, 834 (8th Cir. 2003).

One, the defendant intentionally distributed heroin;

Two, at the time of the transfer, the defendant knew that it was heroin; and

Three, the use of the heroin was the proximate cause of a death.

For you to find the defendant guilty of the crime charged under Count 2, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime under Count 2.

Burrage's Proposed Jury Instruction No. 14:

DEFINITION: RESULTING IN DEATH

The element "resulting in death" listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death.

Burrage's Proposed Jury Instruction No. 15:

DEFINITION: PROXIMATE CAUSE

As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.

A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

The district court did not err in rejecting Burrage's proximate cause instructions, because they do not correctly state the law. In *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), this court held that a showing of "proximate cause" is not required under § 841(b)(1). ***Id.*** at 972-73. Burrage requests this court overrule *McIntosh*, but only the court sitting en banc can take that action. *See* ***Brock v. Astrue***, 674 F.3d 1062, 1065 (8th Cir. 2012).[4]

2.

Burrage contends that the district court erred by using "contributing cause" language to define the statute's causation element. However, the instruction is consistent with this court's statement that § 841(b)(1)'s "results from" requirement is met by a "contributing cause." ***United States v. Monnier***, 412 F.3d 859, 862 (8th Cir. 2005), *post-conviction relief granted as to sentencing by* 718 F. Supp. 2d 1040 (D. Neb. 2010). In *Monnier*, the jury, given an instruction "akin to a proximate cause instruction," convicted the defendant of distribution of methamphetamine that resulted in death in violation of § 841(b)(1)(A). The defendant appealed the sufficiency of the evidence. First, this court held that the proximate cause instruction did not accurately state the law after *McIntosh*. ***Id.*** at 861-62. However, it then affirmed the conviction because "pursuant to the district court's instruction the jury found proximate cause beyond a reasonable doubt, which necessarily means that it

---

[4]Every circuit to address the issue agrees with *McIntosh* on this point. *See* ***United States v. De La Cruz***, 514 F.3d 121, 138 (1st Cir. 2008); ***United States v. Robinson***, 167 F.3d 824, 830-31 (3d Cir. 1999); ***United States v. Patterson***, 38 F.3d 139, 144-45 (4th Cir. 1994); ***United States v. Houston***, 406 F.3d 1121, 1122-23 (9th Cir. 2005); ***United States v. Webb***, 655 F.3d 1238, 1250 (11th Cir. 2011); *cf.* ***United States v. Hatfield***, 591 F.3d 945, 950-51 (7th Cir. 2010) (noting "some misgivings about interpreting 'results from' in the statute to impose strict liability," but avoiding the issue because "the defendants [did] not challenge the interpretation of the statute as imposing strict liability on them for death or injury to recipients of their drugs").

found *contributory cause*." ***Id.*** at 862 (emphasis added). The court then defined "contributing cause" as "[a] factor that – though not the primary cause – plays a part in producing a result." ***Id.***, *quoting* ***Black's Law Dictionary*** 212 (7th ed. 1999).

Burrage notes that the instructions used by the district court do not appear in the 2011 edition of the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*. However, "[t]he Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts." ***Bady v. Murphy-Kjos***, 628 F.3d 1000, 1004 (8th Cir. 2011) (alterations in *Bady*), *quoting* ***United States v. Norton***, 846 F.2d 521, 525 (8th Cir. 1988).

Burrage also relies on *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In that case, the Seventh Circuit expressly rejected a jury instruction adopting the "contributing cause" language from *Monnier*, endorsed a jury instruction using the statute's language without embellishment, reversed, and remanded for a new trial. ***Id.*** at 947-51. The Seventh Circuit expressed concern that the district court's elaboration on the statutory language may have confused the jury. ***Id.*** at 949. The *Hatfield* court distinguished *Monnier* because it "was not quoting from or approving a jury instruction." ***Id.*** Burrage urges this court to do the same.

Unlike the *Hatfield* court, this panel is bound by *Monnier*'s formulation of the "results from" standard. The jury instructions for Count Two fairly and adequately instructed the jurors. The district court did not abuse its discretion by including the "contributing clause" language. *See* ***Yielding***, 657 F.3d at 708 (reviewing jury instructions that defined statutory terms for an abuse of discretion).

B.

Burrage also argues that he is entitled to a new trial because the prosecutor improperly remarked while cross-examining him – and again during closing arguments – that the voice on the audio recording of the controlled buy sounded like him.

During the direct examination of Burrage, his attorney asked, "Was that you on that recording?," referring to the recording of the controlled buy played earlier in the trial. He responded, "No, Ma'am." During cross-examination, the prosecutor played the tape and asked, "Mr. Burrage, the tone and inflection of the individual heard on that videotape selling drugs to Breanne Brown sounds an awful lot like you?" Burrage's counsel objected, the court overruled it, and the prosecutor repeated, "It sounds an awful lot like you, doesn't it?" Burrage denied it. The prosecutor continued: "You don't think that was in the same tone?," "The same inflection?," "The same pronunciation?," and "That's you on that tape isn't it?" Burrage answered each question: "No, sir."

During closing argument, the prosecutor stated:

> You know, one of the things that we got by his testimony is that you got to observe him other than just sitting at counsel table. You got to see how he talked, what his inflection was, his use of words and the English language, things along those lines. You were able to hear the inflection in his voice and things of that nature.
>
> And one of the things that they can't get past, no matter how they try and do it, is the audio tape of the first buy. And I'm going to play that for you, you've heard it a couple of times but I'm going to play it again.
>
> I'd ask that you do that now.

(Audio tape played in open court.)

> Ladies and gentlemen, there's a reason why that individual we just heard on the audio tape of that transaction that occurred on November 17th of 2009 sounds like the defendant, why the tone is consistent, why the inflection is consistent, why the use of the English language is consistent. And the reason why it's consistent is because that's the defendant, Marcus Andrew Burrage, on that tape. He distributed that heroin to Breanne Brown on November 17th of 2009.

Burrage did not object at trial, but raised the issue in his post-verdict motion for a new trial.

This court reviews for an abuse of discretion the denial of a motion for a new trial based on prosecutorial misconduct. ***United States v. Thomas***, 664 F.3d 217, 224 (8th Cir. 2011). "To reverse a conviction 'based on prosecutorial misconduct to which there was a proper objection, a defendant must show that (1) the prosecutor's remarks or conduct were improper, and (2) the remarks or conduct affected the defendant's substantial rights so as to deprive him of a fair trial.'" ***Id.***, *quoting* ***United States v. Montgomery***, 635 F.3d 1074, 1096-97 (8th Cir. 2011). Because Burrage did not object to the prosecutor's comments during closing argument, the denial of the motion for a new trial as it relates to that comment is reviewed for plain error. ***United States v. Kieffer***, 621 F.3d 825, 831 (8th Cir. 2010). To establish plain error, Burrage bears the burden of establishing that the district court's failure to grant him a new trial based on that comment was "(1) error, (2) that is plain, and (3) that affects substantial rights. Even if [Burrage] establishes all three plain-error factors, we may exercise our discretion to notice the forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." ***United States v. Martinson***, 419 F.3d 749, 752 (8th Cir. 2005) (internal quotations and citations omitted).

The district court did not abuse its discretion or commit plain error, because the prosecutor's comments were proper. By denying that the voice on the recording was his during direct examination, Burrage opened the door to further questions about it during cross-examination. *See* **Fed. R. Evid. 611(b)** ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility."). And, the prosecutor's leading question ("Mr. Burrage, the tone and inflection of the individual heard on that videotape selling drugs to Breanne Brown sounds an awful lot like you?") was appropriate on cross. *See* **Fed. R. Evid. 611(c)** ("Ordinarily, the court should allow leading questions . . . on cross-examination . . . ."). The prosecutor did not improperly comment on the evidence or testify as an expert witness.

The prosecutor's comments during closing were also proper. "A prosecutor must limit the closing argument to the evidence and the reasonable inferences that may be drawn from it." ***United States v. Eagle***, 515 F.3d 794, 805 (8th Cir. 2008). By testifying at trial, Burrage gave the jury ample opportunity to hear his voice. A jury is competent to compare voices without expert testimony. ***United States v. Samuels***, 543 F.3d 1013, 1015-16 (8th Cir. 2008) (holding that the jury "could judge for themselves" whether two voices were the same); ***United States v. Donaldson***, 110 Fed. Appx. 603, 610 (6th Cir. 2004) (unpublished) (finding no prosecutorial misconduct where the prosecutor's closing argument invited the jury to compare recordings with the non-testifying defendant's voice heard during random outbursts throughout the trial); ***United States v. Cambindo Valencia***, 609 F.2d 603, 640 (2d Cir. 1979) ("[V]oice identification is not generally considered to be an area where expertise is important.").

Burrage further contests that the prosecutor's question and comments breached a pre-trial agreement between the parties that no "earwitness" expert testimony would be offered. Because of this agreement – memorialized in an email exchange – Burrage did not seek funds to offer the testimony of his own expert earwitness.

However, the prosecutor did not breach the agreement. In the emails, the prosecutor agreed not to have "someone who just reviewed the audiotape com[e] in and say[] that [Burrage]'s voice is the voice on the tape." The prosecutor did not call any such witness.

The district court did not abuse its discretion in denying Burrage's motion for a new trial.

III.

A.

Burrage appeals the district court's denial of his motion for a judgment of acquittal. This court reviews de novo the denial of a motion for a judgment of acquittal based on the sufficiency of the evidence to sustain a conviction. ***United States v. Aldridge***, 664 F.3d 705, 715 (8th Cir. 2011).

> On review, evidence is viewed most favorably to the verdict, giving it the benefit of all reasonable inferences. Reversal is appropriate only where no reasonable jury could find all the elements beyond a reasonable doubt. This court does not weigh the credibility of the witnesses or the evidence. The jury has the sole responsibility to resolve conflicts or contradictions in testimony, and credibility determinations are resolved in favor of the verdict.

Id. (citations omitted).

Burrage challenges the sufficiency of the evidence for each count. First, he argues that no reasonable jury could find beyond a reasonable doubt that he distributed heroin to Brown (an element of Count One) or Banka (an element of Count Two). Specifically, he challenges the credibility of the testimony of Brown,

the investigating officers, and Noragon. However, "a witness's credibility is for the jury to decide," ***United States v. Thompson***, ___ F.3d ___, 2012 WL 3023471, at *6 (8th Cir. July 25, 2012), and "[t]he jury's credibility determinations are virtually unreviewable on appeal," ***Aldridge***, 664 F.3d at 715. As described in Part I, there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that he distributed heroin to Brown and Banka.

Burrage also asserts that no reasonable jury could find beyond a reasonable doubt that Banka's death resulted from the heroin distributed by Burrage (an element of Count Two). Burrage states that B's death "resulted from" a mixed drug intoxication, not the heroin. He insists that Banka's death could not have resulted from the heroin because Drs. Schwilke and McLemore could not testify that Banka would not have died if he had not used the heroin. However, both doctors testified that the heroin was a "contributing cause" of his death, which satisfies the *Monnier* standard. ***Monnier***, 412 F.3d at 862. Further, Dr. McLemore testified that the heroin metabolite was the only drug present in levels above the therapeutic range and that death without the heroin was "very less likely." "[G]iving [the verdict] the benefit of all reasonable inferences," a reasonable jury could find Banka's death resulted from the heroin beyond a reasonable doubt. ***Aldridge***, 664 F.3d at 715; *cf.* ***United States v. Washington***, 596 F.3d 926, 942-44 (8th Cir. 2010) (finding sufficient evidence that death resulted from each of two drugs involved in a "mixed narcotic overdose" in order to support conviction on two separate counts (one for each drug) under 18 U.S.C. § 841(b)(1)(C)).

B.

According to Burrage, the district court should have granted a new trial because the verdict was against the weight of the evidence. "The district court has broad, but limited, discretion to grant or deny a motion for a new trial based on the sufficiency of the evidence, and it can weigh the evidence, disbelieve witnesses, and

grant a new trial even where there is substantial evidence to sustain the verdict." ***United States v. Vega***, 676 F.3d 708, 722 (8th Cir. 2012) (internal quotation marks omitted). However, Burrage did not preserve this issue for appeal by including it in his post-trial motion for a new trial.[5] Therefore, this court reviews the issue for plain error. *See* ***Martinson***, 419 F.3d at 752; **Fed. R. Crim. P. 52(b)** ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

To establish plain error, Burrage "bears the burden of establishing that the district court's failure to grant [him] a new trial [based on the weight of the evidence] sua sponte was (1) error, (2) that is plain, and (3) that affects substantial rights. Even if [Burrage] establishes all three plain-error factors, we may exercise our discretion to notice the forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." ***Martinson***, 419 F.3d at 752 (internal quotations and citations omitted). Here, the district court did not err. The district court did not have the power to grant a motion for a new trial on grounds that were not raised by Burrage in his timely-filed motion under Federal Rule of Criminal Procedure 33. ***Id.*** ("[T]he district court did not err because it does not have the power under Rule 33 to order a new trial sua sponte."); ***United States v. Flynn***, 196 F.3d 927, 932 (8th Cir. 1999) ("[A]dditional grounds for relief raised after a timely-filed motion [for a new trial] are procedurally barred.").

---

[5]The fact that Burrage raised sufficiency of the evidence in his motion for a judgment of acquittal does not preserve the issue for review as a motion for new trial. **Martinson**, 419 F.3d at 752 ("Motions for judgment of acquittal are different motions with different substantive standards than motions for a new trial, and we will not construe the filing of one to preserve for our review claims of error relating to the other.").

IV.

Burrage argues that the district court abused its discretion by allowing inadmissible hearsay testimony. This court reviews "a district court's evidentiary rulings for abuse of discretion, according substantial deference to the district court's rulings." ***United States v. Van Elsen***, 652 F.3d 955, 958 (8th Cir. 2011). This court will only reverse "if an error was not harmless." ***United States v. White Bull***, 646 F.3d 1082, 1091 (8th Cir. 2011). "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." **Fed. R. Evid. 801(c)** (current version effective Dec. 1, 2011).

Officer Miller testified:

> Q. What was your reasoning in sending [Burrage's] photograph to Sergeant Martinez?
>
> A. The cause of death that we had been notified was possibly because of a heroin overdose.
>
> [BURRAGE'S COUNSEL]: Objection, Your Honor, this is calling for –
>
> . . .
>
> It's all hearsay.
>
> [PROSECUTOR]: He's testifying, Your Honor, not for the truth of the matter asserted but the subsequent conduct that he took based upon the information that he had received.
>
> THE COURT: On that basis, the objection is overruled.
>
> BY [PROSECUTOR]:
>
> Q. Why did you send that picture to the Nevada Police Department?
>
> A. I sent the photograph due to the fact of through the investigation it was learned that the individual died of a heroin overdose. Heroin is not real prevalent in our community. It's making a

> resurgence, due I guess to the – due to the fact that working narcotics on a full-time basis there is a very limited – I guess a very limited supply base for individuals who are selling heroin. So knowing that we had maybe two individuals, one in particular, that was selling heroin, I sent a photograph of that individual to Sergeant Martinez.

The district court did not abuse its discretion because (1) the part of Officer Miller's testimony Burrage attacks on appeal is not an out-of-court statement, (2) even if it was, the statement was not offered for its truth, and (3) any error was harmless.

Burrage characterizes Officer Miller's response as "I'd heard Burrage was our city's main heroin dealer so I sent his picture." That does not accurately reflect his testimony, which recites his work in narcotics as the foundation for identifying Burrage as a possible suspect in Banka's death. There is no suggestion that Miller relied on an out-of-court statement for that conclusion. The only out-of-court statement potentially included in Miller's testimony is the information relayed to him by the Nevada police department about Banka's death and its link to heroin – a portion of the testimony Burrage does not challenge.

The testimony is also admissible because "[a]n out of court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way." ***United States v. Brown***, 560 F.3d 754, 764 (8th Cir. 2009). Burrage believes that the purported nonhearsay reason masked the real purpose: "to try to prejudice the jury into believing the truth in the statement – that Burrage was a heroin dealer." However, "he did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." ***Id.***

Burrage asks that this court follow *United States v. Evans*, 216 F.3d 80 (D.C. Cir. 2000). An FBI agent there testified that his office "had received . . . information that Mr. Evans was involved in drug trafficking." ***Id.*** at 84. The record showed that

the FBI received that information from an informant who did not testify at trial and was not available for cross-examination. ***Id.*** at 85-86. Officer Miller's testimony here is not similar to the FBI agent's testimony in *Evans*, because it does not allude to some unavailable informant. Burrage had the opportunity to cross-examine Sergeant Martinez about his decision to contact the task force about Banka's death and, the opportunity to cross-examine Officer Miller about his decision to send the photograph to Martinez. *Cf.* ***id.*** at 85 ("The problem with hearsay is that it deprives the defendant of the opportunity to cross-examine the person who uttered the statement at issue.").

Even if the district court erred in admitting the testimony, the error was harmless. "A trial error is harmless 'if other evidence to the same effect was properly before the jury.'" ***United States v. Gettel***, 474 F.3d 1081, 1090 (8th Cir. 2007), *quoting* ***United States v. White***, 11 F.3d 1446, 1451 (8th Cir. 1993). In other testimony, Officer Miller explained his office's investigation and identification of Burrage as a potential heroin dealer. Sergeant Martinez and several other officers testified at trial about their investigation into Banka's death, its possible link with heroin, and their decision to contact Officer Miller's task force.

****

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-3602

United States of America

Appellee

v.

Marcus Andrew Burrage

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:10-cr-00095-RP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 13, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

OPPOSITION BRIEF

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
MAR 26 2013
OFFICE OF THE CLERK

No. 12-7515

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RECEIVED
MAR 26 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether the provision of 21 U.S.C. 841(b)(1)(C) establishing an increased sentencing range when "death results" from trafficking in a controlled substance requires a showing of the defendant's mens rea with respect to the death.

2. Whether the provision of 21 U.S.C. 841(b)(1)(C) establishing an increased sentencing range when "death results" from trafficking in a controlled substance requires a showing that the death was the foreseeable result of the drug-trafficking offense.

3. Whether a "death results" from trafficking in a controlled substance within the meaning of 21 U.S.C. 841(b)(1)(C) if the controlled substance "was a contributing cause of [the] death," as the jury was instructed in petitioner's case.

4. Whether an officer's testimony explaining why he provided a photograph of petitioner to other officers investigating the victim's death was inadmissible hearsay requiring reversal of petitioner's conviction.

IN THE SUPREME COURT OF THE UNITED STATES

No. 12-7515

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-37) is reported at 687 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2012. A petition for rehearing was denied on September 13, 2012 (Pet. App. 38). The petition for a writ of certiorari was filed on November 27, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of distributing heroin and one count of distributing heroin resulting in death, both in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). The district court sentenced him to concurrent terms of 240 months of imprisonment on each count. The court of appeals affirmed. Pet. App. 21-37.

1. On November 17, 2009, petitioner distributed heroin to a confidential informant, Breanne Brown. Brown contacted Officer Jamie Miller of the Central Iowa Drug Task Force to inform him that she could purchase heroin that day from "Lil C," whom Officer Miller knew from earlier investigations to be petitioner. Officer Miller watched Brown conduct a controlled purchase of heroin from petitioner. Officer Miller recognized petitioner, and an electronic device in Brown's purse made an audio recording of the transaction. Pet. App. 22; Gov't C.A. Br. 2-3.

Petitioner also distributed heroin on April 14, 2010. Joshua Banka, accompanied by his wife, Tammy Noragon Banka (Noragon), purchased one gram of heroin from petitioner. Banka used some of the heroin almost immediately, became groggy, and fell asleep. After Noragon helped him home, Banka woke up around midnight complaining of pain. He used some more heroin then and again at around 5 a.m., when Noragon went to sleep. When she woke at about 10:30 a.m., Noragaon found Banka's dead body seated on the toilet,

slumped into the shower. When officers responded to Noragaon's call for help, they found "drug paraphernalia and a number of narcotics and prescription medications, including alprazolam, clonazepam, oxycodone, baclofen, heroin, and marijuana." Pet. App. 22. According to Noragon, Banka "was a long-time, multiple drug user" and "she saw him use marijuana and oxycodone the day before he died." Ibid.; see Gov't C.A. Br. 4-6. Local officers provided Noragon's description of the person who sold heroin to Banka to the Central Iowa Drug Task Force. In response, Officer Miller sent petitioner's photograph to the local officers. Noragon identified petitioner in a photographic lineup and again at trial. Pet. App. 23.

2. A grand jury in the Southern District of Iowa returned a superseding indictment charging petitioner with the counts described above, arising out of the transactions on November 17, 2009, and April 14, 2010. Superseding Indictment 1. Petitioner proceeded to a jury trial.

a. At trial, two medical experts testified about the circumstances of Banka's death. Dr. Eugene Schwilke, a forensic toxicologist, examined blood and urine samples taken from Banka's body. His tests "detected multiple drugs, including morphine (a metabolite of heroin), 6-monoacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam,

marijuana metabolites, and oxycodone." Pet. App. 23 (footnote omitted). According to Dr. Schwilke, "heroin was a contributing factor to Banka's death, but he could not state that Banka would not have died if he had not taken heroin." Ibid.

Dr. Jerri McLemore, a state medical examiner, conducted Banka's autopsy. Based on her examination and the toxicology report, she "certified the cause of death as 'a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam.'" Pet. App. 23. She also explained that "'morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range,'" ibid., and that it "was at a significantly high level." 6/28/11 Trial Tr. (Trial Tr.) 273. Dr. McLemore "could not state that Banka would not have died if he had not taken heroin, but she did describe death without the heroin as 'very less likely.'" Pet. App. 23.

b. Under 21 U.S.C. 841(b)(1)(C), a person convicted of distributing a schedule II controlled substance, including heroin, "shall be sentenced to a term of imprisonment of not more than 20 years and if death * * * results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." With respect to the count charging him with distribution resulting in death, petitioner proposed instructing the jury that it was required to find "that

the distribution of the heroin was the proximate cause of death." Pet. App. 26 n.3. Petitioner proposed to define proximate cause as:

> a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

Ibid.

The district court rejected those instructions and instead instructed the jury that it was required to find that: (1) the defendant intentionally distributed heroin; (2) at the time of the transfer defendant knew that it was heroin; and (3) "[a] death resulted from the use of the heroin." Pet. App. 24-25. The court further instructed: "For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by [petitioner] was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death[.]" Id. at 25. The district court overruled petitioner's objection to the "contributing cause" portion of that instruction. Tr. 394. The jury found petitioner guilty on both counts. Pet. App. 21.

c. At sentencing, the district court assigned petitioner a total offense level of 40 under the advisory Sentencing Guidelines, including a two-level enhancement for obstruction of justice based on petitioner's false trial testimony. The district court placed petitioner in criminal history category VI, yielding an advisory Sentencing Guidelines range of 360 months to life imprisonment. Sent. Tr. 14-15. The government advocated a 360-month sentence. Id. at 11. After noting that petitioner's offense resulted in "the untimely death of a very young person" and that petitioner's crime was among the "most serious" offenses prosecuted in district court, the court imposed concurrent terms of 240 months of imprisonment on each count. Id. at 15, 17-18

3. The court of appeals affirmed. Pet. App. 21-37. As relevant here, petitioner renewed his challenge to the jury instructions on the count charging him with distribution of a controlled substance resulting in death. He contended that the district court should have instructed the jury that, in order to find that Banka's death "result[ed]" from the heroin distributed by petitioner, the jury had to find that the use of the heroin was the proximate cause of Banka's death. Relying on its prior decision in United States v. McIntosh, 236 F.3d 968 (8th Cir.), cert. denied, 532 U.S. 1022 (2001), the court of appeals rejected petitioner's claim. Pet. App. 27 (concluding that "a showing of 'proximate cause' is not required" under 21 U.S.C. 841(b)(1)). The court

further noted that "[e]very circuit to address the issue agrees with McIntosh on this point." Id. at 27 n.4.

Petitioner also contended "that the district court erred by using 'contributing cause' language to define the statute's causation element." Pet. App. 27. The court of appeals rejected that argument, explaining that the instruction was "consistent with this court's statement that [Section] 841(b)(1)'s 'results from' requirement is met by a 'contributing cause.'" Ibid. (quoting United States v. Monnier, 412 F.3d 859, 862 (8th Cir. 2005), cert. denied, 546 U.S. 1116 (2006)). The court noted that in Monnier, it had "defined 'contributing cause' as '[a] factor that -- though not the primary cause -- plays a part in producing a result,'" and therefore the district court did not abuse its discretion in including substantially similar language in its jury instruction. Id. at 28. The court acknowledged that the Seventh Circuit in United States v. Hatfield, 591 F.3d 945 (2010), had "rejected a jury instruction adopting the 'contributing cause' language from Monnier," instead "endors[ing] a jury instruction using the statute's language without embellishment," but the court of appeals concluded that in petitioner's case it was "bound by Monnier's formulation of the 'results from' standard." Pet. App. 28.

Relatedly, petitioner contended that the evidence was insufficient to show that Banka's death resulted from the heroin distributed by petitioner. Petitioner relied on the evidence that

Banka's death "'resulted from' a mixed drug intoxication, not the heroin" and that the experts "could not testify that Banka would not have died if he had not used the heroin." Pet. App. 33. The court concluded that the evidence was sufficient because "both doctors testified that the heroin was a 'contributing cause' of [Banka's] death, which satisfies the Monnier standard." Ibid. The court further pointed out that "the heroin metabolite [morphine] was the only drug present in levels above the therapeutic range" and that one of the experts testified that "death without the heroin was 'very less likely.'" Ibid.

Petitioner also challenged the admission of Officer Miller's testimony about why he provided petitioner's photograph to local officers investigating Banka's death, contending that the testimony was inadmissible hearsay. The court found that the district court "did not abuse its discretion because (1) the part of Officer Miller's testimony [petitioner] attacks on appeal is not an out-of-court statement, (2) even if it was, the statement was not offered for its truth, and (3) any error was harmless." Pet. App. 36.

ARGUMENT

Petitioner principally challenges (Pet. 12-16) the district court's instructions to the jury on the sentencing enhancement in 21 U.S.C. 841(b)(1)(C) that applies when "death results" from the defendant's drug-trafficking crime. He contends that the court of appeals erred in sustaining his conviction in the absence of a

showing of "proximate cause, forseeability, or mens rea." Pet. 13. He further contends that the lower courts erred in concluding that the "death results" factor was satisfied "when the heroin was merely a 'contributing cause' of the death by mixed drug intoxication, rather than the sole cause of death." Ibid. The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner first contends that the court of appeals should have recognized a mens rea requirement in connection with the "death results" provision of 21 U.S.C. 841(b)(1)(C). As an initial matter, petitioner never argued in either the district court or the court of appeals that Section 841(b)(1)(C)'s "death results" provision requires proof of mens rea. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). The Court should adhere to that rule here.

In any event, no mens rea requirement attaches to the "death results" provision. That question is a matter of statutory construction. Staples v. United States, 511 U.S. 600, 604 (1994). The "starting place [of the] inquiry" is "[t]he language of the statute." Id. at 605. The text of the statute does not require that the defendant have "knowingly" or "recklessly" caused the

death, and this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." Dean v. United States, 556 U.S. 568, 572 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)). Congress's use of the passive voice ("if death * * * results," 21 U.S.C. 841(b)(1)(C)) also indicates that the provision does not require proof of mens rea. As Dean explained, "[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. * * * It is whether something happened -- not how or why it happened -- that matters." 556 U.S. at 572.

Petitioner points to the principle that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Pet. 12 (quoting Staples, 511 U.S. at 604). But the presumption in favor of mens rea is designed to avoid criminalizing otherwise lawful conduct. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994) (recognizing that presumption does not apply to each element of a criminal offense, but to "each of the statutory elements that criminalize otherwise innocent conduct"); see also Carter v. United States, 530 U.S. 255, 269-270 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal

quotation marks and citation omitted). No such concern arises with respect to 21 U.S.C. 841(b)(1)(C)'s "death results" provision because that provision applies only when the defendant is otherwise guilty of drug trafficking under 21 U.S.C. 841(a), which requires proof of mens rea; the enhanced penalties under the "death results" provision do not have the effect of criminalizing otherwise lawful conduct.

This Court rejected the same argument in Dean. There, the Court addressed whether the accidental discharge of a firearm -- i.e., discharge without mens rea -- during a crime of violence triggered enhanced minimum punishment under 18 U.S.C. 924(c)(1)(A)(iii). The Court concluded that it did, finding no basis to apply the presumption in favor of mens rea. "It is unusual to impose criminal punishment for the consequences of purely accidental conduct," the Court noted, "[b]ut it is not unusual to punish individuals for the unintended consequences of their unlawful acts." Dean, 556 U.S. at 575. Identical reasoning applies with respect to the "death results" provision here.

2. Petitioner also contends that the "death results" provision requires proof that the death was the foreseeable result of the drug-trafficking offense. Pet. 12-13.* That is incorrect,

---

* Petitioner does not distinguish the terms "foreseeability" and "proximate cause," and "forseeability is widely defined as an element of proximate cause." United States v. Webb, 655 F.3d 1238, 1250 n.9 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012).

and no disagreement exists in the circuits on that issue.

a. Every court of appeals to decide the issue agrees that the "death results" provision does not require proof that the death was foreseeable or that the defendant's conduct was the proximate cause of the death. See United States v. Webb, 655 F.3d 1238, 1254-1255 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012); United States v. De La Cruz, 514 F.3d 121, 137 (1st Cir. 2008) cert. denied, 557 U.S. 934 (2009); United States v. Houston, 406 F.3d 1121, 1124-1125 (9th Cir.), cert. denied, 546 U.S. 914 (2005); United States v. McIntosh, 236 F.3d 968, 971-974 (8th Cir.), cert. denied, 532 U.S. 1022 (2001); United States v. Robinson, 167 F.3d 824, 830-832 (3d Cir.), cert. denied, 528 U.S. 846 (1999); United States v. Patterson, 38 F.3d 139, 144-145 (4th Cir. 1994), cert. denied, 514 U.S. 1113 (1995); see also United States v. Rebmann, 226 F.3d 521, 525 (6th Cir. 2000) (stating in dicta that Section 841(b)(1) "is, in effect, a strict liability statute with respect to the injury or death of another arising out of the distribution of drugs"), overruled on other grounds by United States v. Leachman, 309 F.3d 377, 385 n.9 (6th Cir. 2002).

b. Rather than a showing of proximate causation, "[w]hat is required under the death-enhancing statute is that the government prove cause-in-fact, that is, that the decedent's death was caused in fact by his or her use of drugs that were distributed either by the defendant himself or by others in a conspiracy of which the

defendant was a part." De La Cruz, 514 F.3d at 138; see Webb, 655 F.3d at 1254-1255 ("The statute requires a cause-in-fact connection between the victim's ingestion of the drugs and death.").

The text of Section 841(b)(1) makes clear that proximate cause or foreseeability is not required. See Houston, 406 F.3d at 1124 (Congress's use of the passive phrase "if death * * * results" "unambiguously eliminates any statutory requirement that the death have been foreseeable"); McIntosh, 236 F.3d at 972 ("[The provision] is unambiguous and [] giving effect to its plain meaning prohibits us from superimposing upon the statute a foreseeability or proximate cause requirement. From the statute's language, it is clear Congress intended to expose a defendant to a more severe minimum sentence whenever death or serious injury is a consequence of the victim's use of a controlled substance that has been manufactured or distributed by that defendant.") (emphasis in original); Robinson, 167 F.3d at 830-831 ("Where, as here, Congress' language is plain and unambiguous, we simply apply the language of the statute as written.") (internal quotation marks omitted); Patterson, 38 F.3d at 145 ("[T]he plain language of [Section] 841(b)(1)(C) does not require, nor does it indicate, that prior to applying the enhanced sentence, the district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event."). As the Fourth Circuit explained:

> The statute puts drug dealers and users on clear notice that their sentences will be enhanced if people die from using the drugs they distribute. Where serious bodily injury or death results from the distribution of certain drugs, Congress has elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death would result. We will not second-guess this unequivocal choice.

Patterson, 38 F.3d at 145 (citations and footnote omitted).

Petitioner's reliance on United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010), is unavailing. In Hatfield, the Seventh Circuit did not hold that the parallel "death results" provision in 21 U.S.C. 841(b)(1)(A) required a finding of foreseeability or proximate cause. To the contrary, as part of its analysis of a jury instruction that defined the meaning of the "results from" provision, the Hatfield court noted that "[t]he death or injury need not have been foreseeable." 591 F.3d at 948; see also id. at 949 ("proximate cause usually implies foreseeability, which we know is not required in our case") (citations omitted). And although the court expressed some "misgivings" about Congress's choice to make the "death results" enhancement one of strict liability, the Hatfield court acknowledged:

> [T]he cases are unanimous and emphatic that section 841(b)(1)(A) imposes strict liability.
>
> A realistic consideration * * * supports the conclusion: strict liability creates an incentive for a drug dealer to warn his customer about the strength of the particular batch of drugs being sold and to refuse to supply drugs to particularly vulnerable people. And strict liability does not offend against the principle of marginal deterrence * * * because it does not give the seller an incentive to commit a more serious crime.

Id. at 950-951. Particularly given the lack of any conflict among the circuits, further review of the foreseeability question is unwarranted.

3. Petitioner also challenges (Pet. 13-16) the instruction that the jury could find that a death "resulted from" the heroin distributed by petitioner if the heroin was a "contributing cause" of Banka's death, and further instructing that "[a] contributing cause is a factor that, although not the primary cause, played a part in the death." Pet. App. 25. Although the court of appeals' endorsement of that instruction conflicts with Hatfield's rejection of a similar instruction, the narrow conflict over the precise wording of the causation instruction does not warrant further review.

a. The court of appeals endorsed the district court's jury instruction based on its decision in United States v. Monnier, 412 F.3d 859 (8th Cir.), cert. denied, 546 U.S. 1116 (2006). Pet. App. 27-28. In Monnier, the court of appeals rejected a challenge to the sufficiency of the evidence on a charge of distribution of methamphetamine resulting in death based on its conclusion that the jury necessarily found "contributory cause." 412 F.3d at 862. The court of appeals defined contributory cause as "[a] factor that -- though not the primary cause -- plays a part in producing a result." Ibid. (quoting Black's Law Dictionary 212 (7th ed. 1999)).

The court of appeals correctly sustained the district court's instructions. To prove that Banka's death resulted from the use of the heroin distributed by petitioner, the government had to prove that the heroin was a cause-in-fact of the death, which is sometimes referred to as "but-for causation." See Webb, 655 F.3d at 1254-1255; De La Cruz, 514 F.3d at 138. In this case, there were (even according to petitioner's theory of the case) multiple causes of Banka's death. Because Banka had ingested several drugs, the medical experts determined that death was a result of mixed-drug intoxication and, because of the presence of multiple drugs, the experts could not say that Banka would not have died if he had not taken the heroin, but opined that Banka's death without the heroin was "very less likely." Pet. App. 23.

The law has long understood how to address the conduct of multiple actors whose "combined conduct, viewed as a whole, is a but-for cause of the [harm]": When "application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm]." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 at 268 (5th ed. 1984). The district court's instructions were faithful to that principle. They required the jury to find that the heroin contributed to Banka's death to find petitioner liable under the "death results" provision, and they

prevented petitioner from escaping additional criminal sanction merely because multiple factors caused Banka's death.

b. In Hatfield, the Seventh Circuit "rejected a jury instruction adopting the 'contributing cause' language from Monnier, endorsed a jury instruction using the statute's language without embellishment, reversed, and remanded for a new trial." Pet. App. 28. Although that ruling conflicts with the decision below, further review at this time is not warranted. As an initial matter, the disagreement exists only between the Seventh and Eighth Circuits and it is very recent. Hatfield was decided in 2010 and, aside from the decision below, has been discussed in substance in only one other federal criminal appellate decision outside the Seventh Circuit: the Eleventh Circuit's decision in Webb, which agreed with Hatfield's discussion of proximate cause (see Webb, 655 F.3d at 1253; pp. 12-13, supra), and specifically noted that the challenge to the jury instructions in Webb did not present the Hatfield court's concern (see Webb, 655 F.3d at 1253 n.14).

Moreover, even though the Seventh and Eighth Circuits have reached differing views on the appropriateness of a particular jury instruction, it is not clear that the circuits disagree about the underlying legal standard. The Hatfield court's disapproval of the instructions in question rested on its concern that it "d[id]n't understand what a jury would make of" the instructions and its sense that "the statutory language [alone] * * * was a good

deal clearer than the addition[al instruction given] and probably clear enough." 591 F.3d at 949. Although the Seventh Circuit regarded those as sufficient grounds for disapproving the instructions given in Hatfield, the Seventh Circuit did not express a view on whether the "death results" provisions of 21 U.S.C. 841(b)(1) incorporate the ordinary legal rules assigning responsibility in the face of combined conduct that was the but-for cause of the harm, see pp. 16-17, supra. Nor did the decision below address that question, because the instructions had effectively been approved under the Eighth Circuit's precedent in Monnier. Because the narrow instructional disagreement may not turn on any substantive conflict, at the very least the scope of any conflict is insufficiently developed to warrant this Court's review at this time.

4. Petitioner also renews his contention (Pet. 16-17) that the district court erred in allowing Officer Miller to testify about why he provided petitioner's photograph to local officers investigating Banka's death. In particular, he asserts that the testimony constituted inadmissible hearsay. That factbound contention lacks merit. As the court of appeals explained, in the challenged testimony, Officer Miller was "recit[ing] his work in narcotics as the foundation for identifying [petitioner] as a possible suspect in Banka's death," and "[t]here is no suggestion that Miller relied on" -- much less offered -- "an out-of-court

statement for that conclusion." Pet. App. 36. Moreover, to the extent petitioner challenges the admission of Officer Miller's explanation for his conduct in the investigation, any statements that influenced Officer Miller were not hearsay because they were offered not for their truth, but for their effect on Officer Miller's investigation. See ibid. Accordingly, the challenged testimony was not hearsay. Fed. R. Evid. 801(c).

Petitioner's reliance on Michelson v. United States, 335 U.S. 469, 475-476 (1948), suggests his true contention is not that the testimony was hearsay, but rather that the testimony should have been excluded as improper character or propensity evidence, or as otherwise prejudicial. See Pet. 17. Petitioner failed to object on that basis, however, in the district court. Cf. Pet. App. 36 (noting that petitioner "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value") (internal quotation marks omitted). In any event, the court of appeals correctly found that any error in admitting the testimony was harmless because "other evidence to the same effect was properly before the jury." Id. at 37 (internal quotation marks and citation omitted); see ibid. (other trial evidence "explained [Officer Miller's] investigation and identification of [petitioner] as a potential heroin dealer").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

MARCH 2013

REPLY BRIEF

DISTRIBUTED
APR 15 2013

ORIGINAL

FILED
APR - 3 2013
OFFICE OF THE CLERK

12-7515
~~NO. 12-7517~~

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Andrew Burrage,

Petitioner,

-vs-

United States of America,

Respondent.

On Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals

Reply Brief for the Petitioner

RECEIVED
APR 12 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Angela L. Campbell
Dickey & Campbell Law Firm, PLC.
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@dickeycampbell.com

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

ARGUMENT 4

I. PETITIONER APPROPRIATELY PRESERVED ERROR ON THE ISSUE OF WHETHER DISTRIBUTION OF DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A MENS REA, FORESEEABILITY, OR PROXIMATE CAUSE REQUIREMENT. 4

II. DESPITE RESPONDENT'S CONTENTION TO THE CONTRARY, THERE IS CIRCUIT DISAGREEMENT ON THE ISSUE OF THE CORRECT STANDARD OF CAUSATION FOR DISTRIBUTION OF HEROIN CAUSING DEATH 6

CONCLUSION 12

TABLE OF AUTHORITIES

Cases — Pages

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466 (2000) 10

United States Court of Appeals

Consolidated Aluminum Corp. v. C.F. Bean Corp, 833 F.2d 65 (5th Cir. 1987) 4

In Re Goguen, 691 F.3d 62 (1st Cir. 2012) 6

United States v. Bryant, 766 F.2d 370 (8th Cir. 1985) 5

United States v. De La Cruz, 514 F.3d 121 (1st Cir. 2008) 8

United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011) 9

United States v. Hatfield, 591 F.3d 945 (7th 2010) 6, 7, 8, 10

United States v. Houston, 406 F.3d 1121 (9th Cir. 2005) 9, 10

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) 9

United States v. McIntosh, 236 F.3d 968 (8th Cir. 2001) 9

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994) 8

United States v. Pineda-Doval, 614 F.3d 1019 (9th Cir. 2010) 9

United States v. Robinson, 167 F.3d 824 (3rd Cir. 1999) 8

United States v. Santillana, 604 F.3d 192 (5th Cir. 2010) 8

United States v. Soler, 275 F.3d 146 (1st Cir. 2002) 8, 10

United States v. Spinney, 795 F.2d 1410 (9th Cir. 1986) 10

United States v. Wall, 349 F.3d 18 (1st Cir. 2003) 8

United States v. Webb, 655 F.3d 1238 (11th Cir. 2011) 9

United States District Courts

United States v. Cevalier, 776 F.Supp. 853 (D. Vermont 1991) 10

State Courts

State v. Christman, 249 P.3d 680, 751-52 (Wash. Ct. App. 2011) 10

United States Constitution and Statutes

8 U.S.C. § 1324(a)(1) 10

18 U.S.C. § 3623(a)(4) 10

21 U.S.C. § 841 ..... 4, 6, 7, 9

Other

Matheson, Andrew, *A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be an Aspect of the Mens Rea of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 366 (2004) 5

W.La Fave & A. Scott, CRIMINAL LAW 212-15 (2d ed. 1986) 5

ARGUMENT

I. PETITIONER APPROPRIATELY PRESERVED ERROR ON THE ISSUE OF WHETHER DISTRIBUTION OF DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A MENS REA, FORESEEABILITY, OR PROXIMATE CAUSE REQUIREMENT.

The Respondent asserts that Petitioner "never argued in either the district court or the court of appeals that Section 841(b)(1)(C)'s 'death results' provision requires proof of mens rea." Res. 9. Later, somewhat inconsistently, Respondent acknowledges that "foreseeability is widely defined as an element of proximate cause." Res. 9, fn. This misstates the record and mischaracterizes Petitioner's argument.

Petitioner requested three instructions on point at the trial level, which were quoted in the Court of Appeals decision. Pet. App. 25-27. Petitioner requested the marshaling instruction for Count Two, Proposed Instruction 13, to include the third element, "the use of the heroin was the proximate cause of a death." Pet. App. 26-27. Proposed Instruction 14 read, "The element 'resulting in death'... requires... that the distribution of the heroin was the proximate cause of death." Pet. App. 27. Proposed Instruction 15 defined proximate cause as, "a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a ***reasonably probable consequence of the cause of death...***" Pet. App.27 (emphasis added).

Foreseeability is generally defined as "whether any ordinarily prudent man would have foreseen that damage would probably result from his act." *Consolidated Aluminum Corp. v. C.F. Bean Corp*, 833 F.2d 65, 67 (5th Cir. 1987) (internal

quotations omitted) (detailing definitions of foreseeability and their geneses.) As noted in Respondent's footnote, foreseeability is a common element of proximate cause. Res. 11. As not noted anywhere in the government's brief, foreseeability was actually an element of the proximate cause element proposed by the Petitioner at the trial level, and rejected by the Eighth Circuit in its opinion, because Petitioner requested the language, "reasonably probable consequence of the cause of death." Pet. App. 27. Also as not noted anywhere in the government's brief, foreseeability is well known as a type of *mens rea*. *See* W.La Fave & A. Scott, CRIMINAL LAW 212-15 (2d ed. 1986) (four general types of *mens rea* are purpose, knowledge, recklessness, and negligence); *see also United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (reasonably foreseeability is a type of *mens rea*); Matheson, Andrew, *A Critique of United States v. Rybicki: Why Foreseeable Harm Should Be an Aspect of the Mens Rea of Honest Services Fraud*, 28 Am. J. Trial Advoc. 355, 366 (2004) (noting that circuits characterize the limiting principle of foreseeability of harm in the same way, some explicitly call it *mens rea*, others call it a "reasonableness standard").

As such, the Respondent's position that the Court should decline to hear this case because Petitioner did not raise this issue to the lower courts should be disregarded as an intellectually dishonest approach to the facts and law of this case. Burrage was convicted of a strict liability homicide count without a proximate cause, foreseeability, or *mens rea* requirement. He objected to this exclusion, provided language for jury instructions to the contrary, and raised the issue to the

Eighth Circuit Court of Appeals. His conviction should not stand and the Supreme Court should intervene.

II. DESPITE RESPONDENT'S CONTENTION TO THE CONTRARY, THERE IS CIRCUIT DISAGREEMENT ON THE ISSUE OF THE CORRECT STANDARD OF CAUSATION FOR DISTRIBUTION OF HEROIN CAUSING DEATH.

The Respondent acknowledges that there is a "disagreement" between the Seventh and Eighth Circuits regarding whether it is appropriate for district courts to superimpose a "contributing cause" standard into 21 U.S.C. § 841. Res. 17. However, the Respondent asks this Court to disregard the "disagreement" because it is "only" between the two Circuits, it is "very recent," it has only been "discussed in substance" by "one other federal criminal appellate decision outside the Seventh Circuit," it is "not clear that the circuits disagree about the underlying legal standard," and it is "insufficiently developed to warrant this Court's review at this time." Res. 17. The Petitioner respectfully disagrees with these characterizations of the Circuit split.

The First Circuit in *In Re Goguen* cites the Seventh Circuit's decision on this topic, *United States v. Hatfield*, 591 F.3d 945 (7th 2010) for the admission that causation is "an admittedly confusing concept" to the circuits. *In Re Goguen*, 691 F.3d 62, 68 (1st Cir. 2012). Petitioner submits that the circuits are confused, the issues presented in this case are fully developed, and it is time for the Supreme

Court to step in. The instant dispute regarding causation under 21 §841(b)(1) is Goldilocks-esque.[1]

(1) The first bear, representing our argument in section I, argues that an instruction is required to define "results from" as a form of proximate cause with a foreseeability element. This argument is the most defendant-friendly, as it requires the greatest amount of proof, and *mens rea*, before someone is subjected to a twenty-year deprivation of liberty.

(2) On the opposite end of the spectrum, the second bear, can be located within the instructions given in this case, arguing that it should be much easier for the government to convict a defendant by lowering the causation standard to mere "contributory cause." This argument is the one rejected by *Hatfield,* and embodies the Petitioner's objection to the instructions given in the instant case.

(3) Right down the middle, the third bear, argues that "results from" is "just right" as it is. This is because the statutory phrase is sufficiently clear, proximate cause/foreseeability instructions are too lenient and

---

1 "Goldilocks" and "The Three Bears" references a fairy tale which was first published by British author and poet Robert Southey in 1837. The story has a young girl trying out sets of three different items of the bears three bowls of porridge, three chairs, and three beds each successively, only to discover the first two of each item to be wrong, and the third to be "just right." This is characterized as the "dialectrical three" where the first item is wrong in one way, the second wrong in the opposite way, and the third, in the middle, is "just right." *See* http://en.wikipedia.org/wiki/Goldilocks, last accessed April 1, 2013.

"contributory cause" instructions are too harsh, therefore both should be rejected.

We can see the struggle among these differing theories of causation throughout nearly all of the Circuits, to differing results, for nineteen years. *See United States v. De La Cruz*, 514 F.3d 121, 138 (1st Cir. 2008)(foreseeability not required, but affirming a "but-for" instruction on causation); *United States v. Wall*, 349 F.3d 18, 24-25 (1st Cir. 2003) (accepting the trial court's instruction requiring the cocaine to have "played a significant causal role in bringing about the death..." as possibly being a higher standard of causation than necessary under the statute); *United States v. Soler*, 275 F.3d 146, 152-53 (1st Cir. 2002) (rejecting idea that there is a foreseeability requirement of "death results" but not being asked to address whether it is instead a "contributory cause" standard); *United States v. Robinson*, 167 F.3d 824, 831 (3rd Cir. 1999) (rejecting proximate cause and holding that the statute's language is just right as written, and stating to "simply apply the language of the statute as written"); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) (rejecting foreseeability requirement, but not addressing contributory cause as an option); *United States v. Santillana*, 604 F.3d 192, 196 (5th Cir. 2010)(refusing to address whether contributing cause, exclusive cause, or proximate cause is the correct standard because the defendant did not raise the argument correctly and there was sufficient evidence under the heightened standard of causation); *Hatfield*, 591 F.3d at 948 (7th Cir. 2010)(rejecting foreseeability, requiring "but for" causation, and reversing as error the inclusion of

"contributory cause" instead); *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir. 2001) (rejecting both foreseeability and proximate cause, not addressing contributory cause as an embellishment, and stating that the "language is unambiguous" therefore no other requirements should be superimposed); *United States v. Faulkner*, 636 F.3d 1009, 1022 (8th Cir. 2011) (affirming a conviction where the district court utilized foreseeability as the standard for the causation of death); *United States v. Houston*, 406 F.3d 1121, 1124-25 (9th Cir. 2005)(holding trial court's instruction requiring proximate cause and foreseeability to be erroneous); *United States v. Webb*, 655 F.3d 1238, 1255 (11th Cir. 2011) (upholding a "but for" standard of causation, but rejecting a proximate and foreseeability requirement).

This Court could predict how the Sixth Circuit would come down on the issue because of its ruling in *United States v. Martinez*, 588 F.3d 301, 317 (6th Cir. 2009). *Martinez* was the first circuit opinion to address similar language in 18 USC § 1247(2), which contains enhanced penalties for a health care fraud violation where illegal distribution of prescription medications "results in death." *Id.* The *Martinez* court ruled that proximate cause was required under the statute. *Id.* at 318.

Some circuits, like the Ninth, have refused proximate cause and foreseeability instructions under 21 U.S.C. §841, but yet have required such instructions for convictions under other statutes which contain identical "resulting in death" language. *See, e.g., United States v. Pineda-Doval*, 614 F.3d 1019, 1028 (9th Cir. 2010)(government must prove proximate cause for "transportation of

illegal aliens resulting in death" provision of 8 U.S.C. § 1324(a)(1)(A)(ii) & (B)(iv)); *United States v. Spinney*, 795 F.2d 1410,1415 (9th Cir. 1986)(proximate cause and foreseeability required for conviction of committing a misdemeanor resulting in death under 18 U.S.C. § 3623(a)(4)).

In those remaining circuits who have not yet contributed significantly to the causation debate (including the Second, Tenth, Federal and DC Circuits), we still see a history of confusion among their district courts. For example, in a pre-*Apprendi* case,[2] *United States v. Cevalier*, a Vermont district court ruled that the "resulting in death" provision of 21 U.S.C. §841 was a sentencing enhancement provision only, rather than an element of the offense, and only had to be determined at sentencing by a preponderance of the evidence. *United States v. Cevalier*, 776 F.Supp. 853, 860 (D. Vermont 1991).

Even state courts have started commenting about the *Hatfield* line of cases as being improvidently decided. *See State v. Christman*, 249 P.3d 680, 751-52 (Wash. Ct. App. 2011) (Refusing to follow *Hatfield, Houston,* or *Soler* because a defendant's conduct generally must be the proximate cause of the death before criminal liability is applied.)

The confusion, therefore, is manifest, prevalent, and needs Supreme Court intervention. Even though Petitioner suggests to this court that proximate cause and foreseeability are the best choice among the options for causation, Petitioner

---

2 *Apprendi v. New Jersey*, 530 U.S. 466 (2000), negates this holding, requiring all of these "sentencing enhancements" that can be used to increase a mandatory minimum sentence to be tried to a jury beyond a reasonable doubt.

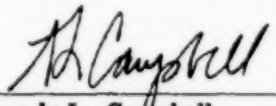
should still prevail utilizing the "just right" standard. The "just right" standard, without the "contributing cause" language has been, in some form, supported by a majority of the circuits, but rejected solely by the Eighth Circuit in the instant case. The district court embellished the statutory language to dilute what was required to be proven by allowing "contributing cause" to replace the statutory language to the detriment of the defendant.

Without the "contributing cause" embellishment to the jury instructions, there was insufficient evidence to convict Burrage. Under a traditional causation analysis, leaving the statute "as it reads," the death did not, beyond a reasonable doubt, "result from" the use of heroin. The government's experts both testified that they could not say that the user would not have died if he had not used heroin. (TT 280, 293, 316). The government did not establish "but for" causation because their experts could not say "but for ingesting the heroin, the user would not have died." By definition, this must mean that, under the law, his death did not "result" from the use of the heroin beyond a reasonable doubt. Because there is insufficient evidence to justify a conviction when taking the "contributing cause" embellishment out of the jury instruction, the "just right" jury instruction would have yielded a different conclusion in favor of Burrage. The Supreme Court should grant certiorari to remedy this injustice and clarify causation for the confused circuits going forward.

CONCLUSION

For the foregoing reasons, and the reasons stated in his initial application, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



Angela L. Campbell
Attorney for the Petitioner
Dickey & Campbell Law Firm, PLC.
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@dickeycampbell.com

Date: April 3, 2013

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL 19 2013
OFFICE OF THE CLERK

No. 12-7515

IN THE

Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

ANGELA L. CAMPBELL*
GARY DICKEY, JR.
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
(515) 288-5008
angela@dickeycampbell.com

JEFFREY T. GREEN
RYAN C. MORRIS
JEREMY M. BYLUND
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

DONALD B. VERRILLI, JR.*
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent
* Counsel of Record

July 19, 2013

PETITION FOR WRIT OF CERTIORARI FILED: NOV. 27, 2012
CERTIORARI GRANTED: APR. 29, 2013

TABLE OF CONTENTS

Page

United States District Court for the Southern District of Iowa, No. 4:10-cr-00095-RP-CFB Relevant Docket Entries 1

United States Court of Appeals, Eighth Circuit, No. 11-3602 Relevant Docket Entries 20

Order Denying Motion for New Trial, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa Aug. 18, 2011) 27

United States v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa Nov. 17, 2011) (judgment) 40

United States v. *Burrage*, 687 F.3d 1015 (8th Cir. 2012) (opinion) 52

Trial Transcript Volume I, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 27, 2011) (excerpts of testimony of Officer J. Miller) 75

Trial Transcript Volume I, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 27, 2011) (excerpt of testimony of Officer S. Smith) 79

Trial Transcript Volume I, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 27, 2011) (excerpt of testimony of Officer D. Lois) 88

Trial Transcript Volume II, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 28, 2011) (excerpts of testimony of T. Noragon Banka) 93

TABLE OF CONTENTS—continued

Page

Trial Transcript Volume II, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 28, 2011) (excerpt of testimony of Dr. McLemore) 136

Government's Exhibit 3-1, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa) (Dr. McLemore's report) 173

Trial Transcript Volume II, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 28, 2011) (excerpt of testimony of Dr. Schwilke) 187

Government's Exhibit 4-1, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa) (AIT Laboratories toxicology report) 210

Trial Transcript Volume II, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 28, 2011) (excerpt re: motion for judgment of acquittal) 213

Trial Transcript Volume II, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 28, 2011) (excerpt re: motion for judgment of acquittal and jury instructions) 219

Trial Transcript Volume III, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 29, 2011) (excerpt of government's closing arg. on contributing factor) 225

Trial Transcript Volume III, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 29, 2011) (excerpt of defense's closing arg. on causation) 231

TABLE OF CONTENTS—continued

Page

Government's Proposed Jury Instructions Nos. 10 & 11, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 16, 2011)..... 233

Defendant's Proposed Jury Instructions Nos. 13–17, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 22, 2011)..... 235

Final Jury Instructions Nos. 10 & 11, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa June 29, 2011)..... 241

Brief in Support of Motion for New Trial, *United States* v. *Burrage*, No. 4:10-cr-00095-RP-CFB (S.D. Iowa July 12, 2011)..... 244

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA (CENTRAL)

Criminal Docket for
Case #: 4:10-cr-00095-RP-CFB All Defendants

USA

v.

Burrage

Date Filed: 08/24/2010
Date Terminated: 11/17/2011

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
09/26/2012	140	MANDATE of USCA as to Marcus Andrew Burrage (gk,) (Entered: 09/26/2012)
08/07/2012	139	OPINION/JUDGMENT of USCA – Affirming District Court – as to Marcus Andrew Burrage re 126 &, 127 Notice of Appeal – Final Judgment Mandate to issue in 14 Days (Attachments: # 1 Appeal Opinion, # 2 Appeal Judgment) (gk,) (Entered: 08/07/2012)

* * * * *

DATE FILED	#	DOCKET TEXT
12/28/2011	135	Certified and Designated Record on Appeal as to Marcus Andrew Burrage to US Court of Appeals re 126 Notice of Appeal – Final Judgment, 127 Notice of Appeal – Final Judgment Date Sent to 8th Circuit: 12/28/11 (Attachments: # 1 Transmittal) (gk,) (Entered: 12/28/2011)
12/19/2011	134	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 99 Jury Trial (Day 2 through last day) held on 06-29-2011 before Judge Pratt. Tape/Page No(s): 396-446. Court Reporter/Transcriber Eileen Hicks, Telephone number 515/243-6596. Transcript may be viewed at court public terminal or purchased through Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 1/9/2012. Redacted Transcript Deadline set for 1/20/2012. Release of Transcript Restriction set for 3/19/2012. (Hicks, Eileen) (Entered: 12/19/2011)
12/19/2011	133	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 98 Jury Trial (Day 2 through last day) held on 6-28-2011 before Judge

DATE FILED	#	DOCKET TEXT
		Pratt. Tape/Page No(s): 180-395. Court Reporter/Transcriber Eileen Hicks, Telephone number 515/243-6596. Transcript may be viewed at court public terminal or purchased through Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 1/9/2012. Redacted Transcript Deadline set for 1/20/2012. Release of Transcript Restriction set for 3/19/2012. (Hicks, Eileen) (Entered: 12/19/2011)
12/19/2011	132	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 97 Voir Dire (Day 1 of Jury Trial) held on 6-27-2011 before Judge Pratt. Tape/Page No(s): 1-179. Court Reporter/Transcriber Eileen Hicks, Telephone number 515/243-6596. Transcript may be viewed at court public terminal or purchased through Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 1/9/2012. Redacted Transcript Deadline set for 1/20/2012. Release of Transcript Restriction set for

DATE FILED	#	DOCKET TEXT
		3/19/2012. (Hicks, Eileen) (Entered: 12/19/2011)
12/12/2011	131	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 123 Sentencing, held on November 17, 2010 before Judge Robert W. Pratt. Tape/Page No(s): 1 - 20. Court Reporter/Transcriber Ann T. Moyna, Telephone number (515)243-6596. Transcript may be viewed at court public terminal or purchased through Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 1/3/2012. Redacted Transcript Deadline set for 1/12/2012. Release of Transcript Restriction set for 3/12/2012. (Moyna, Ann) (Entered: 12/12/2011)
		* * * * *
11/29/2011	128	NOTIFICATION OF APPEAL and NOA Supplement by District Court Clerk to USCA as to Marcus Andrew Burrage re 126 &, 127 Notice of Appeal – filed on 11/23/2011 & 11/24/2011 (gk,) (Entered: 11/29/2011)

DATE FILED	#	DOCKET TEXT
11/24/2011	127	NOTICE OF APPEAL by Marcus Andrew Burrage. (Attachments: # 1 Supplement) (Campbell, Angela) (Entered: 11/24/2011)
11/23/2011	126	PRO SE NOTICE OF APPEAL by Marcus Andrew Burrage. (sk,) (Entered: 11/23/2011)
11/17/2011	125	Sealed Document (nto) (Entered: 11/17/2011)
11/17/2011	124	JUDGMENT IN A CRIMINAL CASE as to Marcus Andrew Burrage (1), Count(s) 1, Superseded; Count(s) 1s-2s, Defendant sentenced to 240 months on Counts One and Two, to be served concurrently and 3 years of supervised release on Counts One and Two, to be served concurrently. Defendant ordered to pay $200 assessment to the Crime Victims Unit. Signed by Judge Robert W. Pratt on 11/17/2011. (nto) (Entered: 11/17/2011)
11/17/2011	123	Minute Entry for proceedings held before Judge Robert W. Pratt: Sentencing held on 11/17/2011 for Marcus Andrew Burrage (1), Count(s) 1, Superseded; Count(s) 1s-2s, Defendant sentenced to 240 months on Counts One and Two to be served concurrently and 3 years of supervised release on each

DATE FILED	#	DOCKET TEXT
		Count to follow, to be served concurrently. Defendant ordered to pay $200 assessment to the Crime Victims Unit. (Court Reporter Ann Moyna.) (nto) (Entered: 11/17/2011)
		* * * * *
11/14/2011	121	REVISED FINAL PRESENTENCE INVESTIGATION REPORT TO REFLECT MOST RECENT SENTENCING COMMISSION GUIDELINE MANUAL PRIOR TO SENTENCING(Sealed) as to Marcus Andrew Burrage (Christensen, Pat) (Entered: 11/14/2011)
11/11/2011	120	SENTENCING MEMORANDUM/ BRIEF by Marcus Andrew Burrage (Piper, Michael) (Entered: 11/11/ 2011)
		* * * * *
10/24/2011	114	FINAL PRESENTENCE INVESTIGATION REPORT (Sealed) as to Marcus Andrew Burrage (Attachments: # 1 Final PSR Cover Defense, # 2 Final PSR Cover Government)(Christensen, Pat) (Entered: 10/24/2011)
		* * * * *
10/05/2011	112	OBJECTION TO PRESENTENCE INVESTIGATION REPORT (SEALED) 110 as to Marcus

DATE FILED	#	DOCKET TEXT
		Andrew Burrage. (Campbell, Angela) (Entered: 10/05/2011)
08/18/2011	111	ORDER denying 107 Motion for New Trial as to Marcus Andrew Burrage (1). Signed by Chief Judge Robert W. Pratt on 8/18/2011. (nto) (Entered: 08/18/2011)
08/15/2011	110	PRESENTENCE INVESTIGATION REPORT DRAFT (Sealed) as to Marcus Andrew Burrage (Attachments: # 1 First Draft Cover Defense, # 2 First Draft Cover Government)(Christensen, Pat) (Entered: 08/15/2011)
		* * * * *
07/21/2011	108	RESPONSE in Opposition/Resistance by USA as to Marcus Andrew Burrage *motion for new trial* Replies due by 8/1/2011. (Courter, John) (Entered: 07/21/2011)
07/12/2011	107	MOTION for New Trial by Marcus Andrew Burrage. Responses due by 7/22/2011 (Attachments: # 1 Brief in Support of Motion for New Trial, # 2 Exhibit A: Expert Report, # 3 Exhibit B: Email with Expert Report, # 4 Exhibit C: Email Chain, # 5 Exhibit D: Email from Government)(Piper, Michael) (Entered: 07/12/2011)
		* * * * *

DATE FILED	#	DOCKET TEXT
06/29/2011	104	JURY VERDICT as to Marcus Andrew Burrage (1) Guilty on Count 1s-2s. (nto) (Entered: 06/29/2011)
06/29/2011	103	Sealed Verdict Form (nto) (Entered: 06/29/2011)
06/29/2011	102	Final Jury Instructions as to Marcus Andrew Burrage (nto) (Entered: 06/29/2011)
06/29/2011	101	EXHIBIT LIST as to Marcus Andrew Burrage. (nto) (Entered: 06/29/2011)
06/29/2011	100	WITNESS LIST as to Marcus Andrew Burrage (nto) (Entered: 06/29/2011)
06/29/2011	99	Minute Entry for proceedings held before Chief Judge Robert W. Pratt:Jury Trial Day 3 as to Marcus Andrew Burrage held on 6/29/2011. (Court Reporter Eileen Hicks.) (nto) (Entered: 06/29/2011)
06/28/2011	98	Minute Entry for proceedings held before Chief Judge Robert W. Pratt:Jury Trial Day 2 as to Marcus Andrew Burrage held on 6/28/2011. (Court Reporter Eileen Hicks.) (nto) (Entered: 06/28/2011)
06/27/2011	97	Minute Entry for proceedings held before Chief Judge Robert W. Pratt:Voir Dire – Day 1 of Jury Trial held on 6/27/2011 as to Marcus Andrew Burrage. (Court

DATE FILED	#	DOCKET TEXT
		Reporter Eileen Hicks.) (nto) (Entered: 06/27/2011)
06/27/2011	95	Peremptory Challenges as to Marcus Andrew Burrage (nto) (Entered: 06/27/2011)
06/27/2011	94	Preliminary Jury Instructions as to Marcus Andrew Burrage (nto) (Entered: 06/27/2011)
06/24/2011	93	ORDER granting in part and denying in part 88 Motion in Limine as to Marcus Andrew Burrage (1). Signed by Chief Judge Robert W. Pratt on 6/24/2011. (nto) (Entered: 06/24/2011)
06/23/2011	92	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 70 Motion Hearing held on 4/28/11 before Judge Pratt. Tape/Page No(s): 1-34. Court Reporter/Transcriber Theresa Kenkel, Telephone number 515-243-6596. Transcript may be viewed at court public terminal or purchased through Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 7/14/2011. Redacted Transcript Deadline set for 7/25/2011. Release of Transcript Restriction set for 9/22/2011. (Ken-

DATE FILED	#	DOCKET TEXT
		kel, Theresa) (Additional attachment(s) added on 6/27/2011: # 1 Signed Certificate) (don,). (Entered: 06/23/2011)
06/22/2011	91	Proposed Jury Instructions by Marcus Andrew Burrage (Campbell, Angela) (Entered: 06/22/2011)
06/22/2011	90	WITNESS LIST by Marcus Andrew Burrage (Campbell, Angela) (Entered: 06/22/2011)
06/22/2011	89	Proposed Voir Dire by Marcus Andrew Burrage (Piper, Michael) (Entered: 06/22/2011)
06/22/2011	88	MOTION in Limine by Marcus Andrew Burrage. Responses due by 7/5/2011 (Campbell, Angela) (Entered: 06/22/2011)
06/21/2011	87	PRE-TRIAL ORDER as to Marcus Andrew Burrage Jury Trial set for 6/27/2011 09:00 AM in Des Moines – Room 265 – 2nd Floor before Chief Judge Robert W. Pratt.. Signed by Chief Judge Robert W. Pratt on 6/21/2011. (mlm,) (Entered: 06/21/2011)
06/20/2011	86	EXHIBIT LIST by USA as to Marcus Andrew Burrage (Courter, John) (Entered: 06/20/2011)
06/20/2011	85	WITNESS LIST by USA as to Marcus Andrew Burrage (Courter, John) (Entered: 06/20/2011)

DATE FILED	#	DOCKET TEXT
06/20/2011	84	PRE-TRIAL ORDER as to Marcus Andrew Burrage Jury Trial set for 6/27/2011 09:00 AM in Des Moines – Room 265 – 2nd Floor before Chief Judge Robert W. Pratt.. Signed by Chief Judge Robert W. Pratt on 6/20/2011. (mlm,) (Entered: 06/20/2011)
06/20/2011	83	Errata re 82 Notice of Intent to Use Evidence (Courter, John) (Entered: 06/20/2011)
06/20/2011	82	NOTICE of Intent to Use Evidence as to Marcus Andrew Burrage *404(b) notice* (Courter, John) (Entered: 06/20/2011)
06/16/2011	81	Proposed Voir Dire by USA as to Marcus Andrew Burrage (Courter, John) (Entered: 06/16/2011)
06/16/2011	80	Proposed Jury Instructions by USA as to Marcus Andrew Burrage (Courter, John) (Entered: 06/16/2011)
06/09/2011	76	TEXT Minute Entry for proceedings held before Magistrate Judge Ross A. Walters:Pretrial Conference as to Marcus Andrew Burrage held on 6/9/2011. Counsel present. Counsel advise Court status of case. Case remains set for trial 6/27/11. (Court Reporter FTR gold.) (dv,) (Entered: 06/09/2011)

DATE FILED	#	DOCKET TEXT
		* * * * *
05/18/2011	73	ORDER denying 58 Motion to Suppress as to Marcus Andrew Burrage (1). Signed by Chief Judge Robert W. Pratt on 5/18/2011. (nto) (Entered: 05/18/2011)
04/28/2011	72	HEARING EXHIBIT LIST as to Marcus Andrew Burrage. (nto) (Entered: 04/28/2011)
04/28/2011	71	HEARING WITNESS LIST as to Marcus Andrew Burrage (nto) (Entered: 04/28/2011)
04/28/2011	70	Minute Entry for proceedings held before Chief Judge Robert W. Pratt:Motion Hearing as to Marcus Andrew Burrage held on 4/28/2011 re 58 MOTION to Suppress filed by Marcus Andrew Burrage. (Court Reporter Theresa Kenkel.) (nto) (Entered: 04/28/2011)
04/28/2011	69	Minute Entry for proceedings held before Chief Judge Robert W. Pratt:Arraignment as to Marcus Andrew Burrage (1) Count 1s-2s held on 4/28/2011. (Court Reporter Theresa Kenkel.) (nto) (Entered: 04/28/2011)
		* * * * *

DATE FILED	#	DOCKET TEXT
04/27/2011	67	REDACTED SUPERSEDING INDICTMENT by USA as to Marcus Andrew Burrage (fm) (Entered: 04/27/2011)
04/27/2011	66	SEALED SUPERSEDING INDICTMENT as to Marcus Andrew Burrage (1) counts 1s, and 2s. (fm) (Entered: 04/27/2011)
		* * * * * *
04/15/2011	62	Errata *Exh 1 to attach to Resistance to Defendant's Motion to Suppress* re 61 Response in Opposition/Resistance filed by USA (Courter, John) (Entered: 04/15/2011)
04/14/2011	61	RESPONSE in Opposition/Resistance by USA as to Marcus Andrew Burrage re 58 MOTION to Suppress *Resistance to Defendant's Motion to Suppress* Replies due by 4/25/2011. (Courter, John) (Entered: 04/14/2011)
04/14/2011	60	ORDER TO CONTINUE – Ends of Justice as to Defendant Marcus Andrew Burrage. Jury Trial set for 6/27/2011 09:00 AM in Des Moines – Room 265 – 2nd Floor before Chief Judge Robert W. Pratt.. Signed by Magistrate Judge Celeste F. Bremer on 4/14/2011. (dv,) (Entered: 04/14/2011)

DATE FILED	#	DOCKET TEXT
04/14/2011	59	TEXT Minute Entry for proceedings held before Magistrate Judge Celeste F. Bremer:Pretrial Conference as to Marcus Andrew Burrage held on 4/14/2011. Counsel present. Counsel advised Court status of case. Counsel moves for continuance of trial. Court grants and sets case for trial on 6/27/11. (dv,) (Entered: 04/14/2011)
04/08/2011	58	MOTION to Suppress by Marcus Andrew Burrage. Responses due by 4/18/2011 (Attachments: # 1 Brief in Support)(Campbell, Angela) (Entered: 04/08/2011)
		* * * * *
03/10/2011	48	TEXT Minute Entry for proceedings held before Magistrate Judge Ross A. Walters:Pretrial Conference as to Marcus Andrew Burrage held on 3/10/2011. Counsel present. Counsel advise Court status of case. Joint Motion to Continue Trial. Court grants and sets for 5/31/11. (Court Reporter FTR Gold.) (dv,) (Entered: 03/10/2011)
		* * * * *
02/24/2011	44	NOTICE OF ATTORNEY APPEARANCE John S Courter appearing for USA. (Courter, John) (Entered: 02/24/2011)

DATE FILED	#	DOCKET TEXT
		* * * * *
02/14/2011	41	NOTICE OF ATTORNEY APPEARANCE 2ND CHAIR: Michael Jon Piper appearing as co-counsel for Marcus Andrew Burrage (Piper, Michael) (Entered: 02/14/2011)
		* * * * *
02/10/2011	39	TEXT Minute Entry for proceedings held before Magistrate Judge Celeste F. Bremer:Pretrial Conference as to Marcus Andrew Burrage held on 2/10/2011. Counsel present were Clifford Wendel and Angela Campbell. Counsel presented status of case. Trial date of 2/28/2011 remains set as a DEFINITE DATE. Parties to inform Chief Judge Robert Pratt when trial will proceed. (Tape #FTR Gold.) (pb,) (Entered: 02/11/2011)
02/10/2011	38	ORDER FOR APPOINTMENT OF COUNSEL as to Marcus Andrew Burrage. Signed by Magistrate Judge Celeste F. Bremer on 2/9/2011. (sc) (Entered: 02/10/2011)
		* * * * *
12/15/2010	29	NOTICE OF ATTORNEY APPEARANCE: Angela Lynnette Campbell appearing for Marcus Andrew Burrage (Campbell, Angela) (Entered: 12/15/2010)

DATE FILED	#	DOCKET TEXT
12/02/2010		Attorney update in case as to Marcus Andrew Burrage. Attorney Angela Lynnette Campbell for Marcus Andrew Burrage added. (sk,) (Entered: 12/02/2010)
		* * * * *
10/27/2010	24	ORDER ON APPEAL OF MAGISTRATE JUDGE DECISION TO DISTRICT JUDGE as to Marcus Andrew Burrage as to Marcus Andrew Burrage (1). Signed by Chief Judge Robert W. Pratt on 10/27/2010. (nto) (Entered: 10/27/2010)
		* * * * *
10/15/2010	20	RESPONSE in Opposition/Resistance by USA as to Marcus Andrew Burrage re 17 APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Marcus Andrew Burrage re 16 Order of Detention Replies due by 10/25/2010. (Wendel, Clifford) (Entered: 10/15/2010)
09/27/2010	18	TRANSCRIPT of Proceedings as to Marcus Andrew Burrage re 15 Detention Hearing held on 9/23/10 before Judge Bremer. Tape/Page No(s): 1-12. Court Reporter/Transcriber Theresa Kenkel, Telephone number 515-243-6596. Transcript may be viewed at court public terminal or purchased through

DATE FILED	#	DOCKET TEXT
		Court Reporter/Transcriber before deadline for Release of Transcript Restriction. After that date it may be obtained through court reporter, Clerk's Office, or PACER. Redaction Request due 10/18/2010. Redacted Transcript Deadline set for 10/28/2010. Release of Transcript Restriction set for 12/27/2010. (Kenkel, Theresa) (Entered: 09/27/2010)
09/24/2010	17	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Marcus Andrew Burrage re 16 Order of Detention (Burns, B) (Entered: 09/24/2010)
09/23/2010	16	ORDER OF DETENTION Pending Trial as to Marcus Andrew Burrage. Signed by Magistrate Judge Celeste F. Bremer on 9/23/2010. (dv,) (Entered: 09/23/2010)
09/23/2010	15	Minute Entry for proceedings held before Magistrate Judge Celeste F. Bremer:Detention Hearing as to Marcus Andrew Burrage held on 9/23/2010. (Court Reporter Theresa Kenkel.) (dv,) (Entered: 09/23/2010)
		* * * * *
09/20/2010	10	ORDER FOR APPOINTMENT OF COUNSEL as to Marcus Andrew Burrage. Signed by Senior Judge Harold D. Vietor on 9/20/2010. (sc) (Entered: 09/20/2010)

DATE FILED	#	DOCKET TEXT
09/20/2010	9	CJA 23 Financial Affidavit by Marcus Andrew Burrage. (sc) (Entered: 09/20/2010)
		* * * * *
09/20/2010	7	Minute Entry for proceedings held before Senior Judge Harold D. Vietor:Arraignment as to Marcus Andrew Burrage (1) Count 1 held on 9/20/2010. (Court Reporter FTR Gold.) (sc) (Entered: 09/20/2010)
09/20/2010	6	Minute Entry for proceedings held before Senior Judge Harold D. Vietor:Initial Appearance as to Defendant Marcus Andrew Burrage held on 9/20/2010. Attorney Nick Drees for defendant. Detention Hearing set for 9/23/2010 01:30 PM in Des Moines – Room 455 – 4th Floor South before Magistrate Judge Celeste F. Bremer. (Court Reporter FTR Gold.) (sc) (Entered: 09/20/2010)
		* * * * *
08/25/2010	2	REDACTED INDICTMENT by USA as to Marcus Andrew Burrage. (sc) (Entered: 08/25/2010)
08/25/2010	1	SEALED INDICTMENT as to Marcus Andrew Burrage (1) count(s) 1. (sc) (Entered: 08/25/2010)

DATE FILED	#	DOCKET TEXT
08/25/2010		Judge update in case as to Marcus Andrew Burrage. Chief Judge Robert W. Pratt and Magistrate Judge Celeste F. Bremer added. (sc) (Entered: 08/25/2010)

GENERAL DOCKET
EIGHTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 11-3602
Docketed: 12/01/2011
Termed: 08/06/2012

UNITED STATES

v.

MARCUS BURRAGE

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
12/01/2011	CRIMINAL case docketed. [3854945] [11-3602] (JMH)
12/01/2011	Originating court document filed consisting of notice of appeal filed pro se on 11/23/11 & by counsel on 11/24/11, Judgment filed 11/17/11 & docket entries, [3854948] [11-3602] (JMH)
12/01/2011	CJA 20 Voucher issued Ms. Angela L. Campbell for Mr. Marcus Andrew Burrage , is hereby appointed under the Criminal Justice Act. – Voucher No. 11360201 ; Nunc Pro Tunc Date – 11/23/2011 [3854955] [11-3602] (JMH)

* * * * *

DATE	DOCKET TEXT
12/19/2011	APPEARANCE filed by Rebecca Goodgame-Ebinger for Appellee United States of America w/service 12/19/2011 [3860988] [11-3602] (RGE)
	* * * * *
01/11/2012	RECORD FILED – Record Part: CLERK'S RECORD, No. of Volumes: 1, Volumes Location: STL, Comments: 3 copies, Source Location: USDC / SI [3868138] [11-3602] (STL)
01/11/2012	RECORD FILED – Record Part: SEALED PSI REPORT, No. of Volumes: 1, Volumes Location: STL, Comments: 3 copies, Source Location: USDC / SI [3868144] [11-3602] (STL)
01/11/2012	RECORD FILED – Record Part: HEARING TRANSCRIPT, No. of Volumes: 1, Volumes Location: STL, Comments: Detention Hearing [Copy do not return to the District Court at end of case], Source Location: USDC / SI, Dt. of Proceeding/Hearing: 09/23/2010, No. of Pgs.: 12, Court Reporter: Kenkel, Theresa [3868149] [11-3602] (STL)
01/11/2012	RECORD FILED – Record Part: SENTENCING TRANS, No. of Volumes: 1, Volumes Location: STL, Comments: Copy do not return to the District Court at end of case,

DATE	DOCKET TEXT
	Source Location: USDC / SI, Dt. of Proceeding/Hearing: 11/17/2011, No. of Pgs.: 20 [3868199] [11-3602] (STL)
01/11/2012	RECORD FILED – Record Part: TRIAL TRANSCRIPT, No. of Volumes: 3, Volumes Location: STL, Comments: Copy do not return to the District Court at end of case, Source Location: USDC / SI, Dt. of Proceeding/Hearing: 06/27/2011 – 6/29/2011, No. of Pgs.: 446, Court Reporter: Hicks, Eileen [3868206] [11-3602] (STL)
	* * * * *
01/26/2012	**ADDENDUM** of APPELLANT filed by Appellant Mr. Marcus Andrew Burrage. w/service 01/26/2012 [3873669] [11-3602] (YML)
	* * * * *
02/02/2012	**BRIEF FILED** – APPELLANT BRIEF filed by Mr. Marcus Andrew Burrage , w/service 01/31/2012 Length:30 pgs **10 COPIES OF PAPER BRIEFS FROM Marcus Andrew Burrage due 02/07/2012 WITH revised certificate of service for paper briefs.** Appellee brief due on 02/23/2012. [3876307] [11-3602] (YML)

DATE	DOCKET TEXT
02/06/2012	RECORD FILED – Record Part: APLNT/PET APPENDIX, No. of Volumes: 1, Volumes Location: STL, Comments: 3 Copies [3877302] [11-3602] (YML)
02/06/2012	Paper copies Appellant/Petitioner Brief, [3876307-2] filed by Mr. Marcus Andrew Burrage 10 paper copies received. [3878430] [11-3602] (YML)
02/08/2012	Paper copies [3873669-2], Addendum filed by Mr. Marcus Andrew Burrage 10 paper copies received. [3878442] [11-3602] (YML)
	* * * * *
03/14/2012	**BRIEF FILED** - APPELLEE BRIEF filed by United States of America, w/service 03/13/2012 Length: 10,104 words **10 COPIES OF PAPER BRIEFS FROM United States of America due 03/19/2012 WITH revised certificate of service for paper briefs.**. Marcus Andrew Burrage's reply brief due 03/21/2012. [3889800] [11-3602] (YML)
03/16/2012	**SET FOR ARGUMENT** – CASE PLACED ON CALENDAR – ***for Argument in St. Louis on Tuesday, 04/17/2012*** To be heard before **Judges Kermit E. Bye, C. Arlen Beam, Duane Benton in**

DATE	DOCKET TEXT
	Division II. The courtroom deputy will be Linda A. Dahm. All attorneys presenting oral argument must complete a Response Form. The Response Form may be found at http://www.ca8.uscourts.gov/newcoa/forms/OralArgumentResponseForm.pdf. For the complete calendar go to http://www.ca8.uscourts.gov/webcal/apr12stl.pdf **PLEASE REVIEW THE ENTIRE CALENDAR CAREFULLY, PARTICULARLY THE COUNSEL NOTICE PAGE**. *If you are appointed counsel under the Criminal Justice Act and require airline transportation to oral argument, the court will issue a travel authorization the next business day.* [11-3602] (KAS)
03/16/2012	Paper copies Appellee/Respondent brief, [3889800-2] filed by United States of America 10 paper copies received. [3892196] [11-3602] (YML)
	* * * * *
03/26/2012	REPLY brief of Mr. Marcus Andrew Burrage submitted for review. The time for filing the subsequent brief does not begin to run until the brief has been approved and filed. [3894254] [11-3602] (ALC)

DATE	DOCKET TEXT
03/27/2012	**BRIEF FILED** – APPELLANT REPLY BRIEF filed by Mr. Marcus Andrew Burrage,. w/service 03/26/2012 Length: 10 pgs **10 COPIES OF PAPER BRIEFS FROM Marcus Andrew Burrage due 04/02/2012 WITH revised certificate of service for paper briefs.** [3894478] [11-3602] (YML)
04/02/2012	Paper copies Reply brief, [3894478-2] filed by Mr. Marcus Andrew Burrage 10 paper copies received. [3896529] [11-3602] (YML)
04/17/2012	ARGUED & SUBMITTED in St. Louis to Judges Kermit E. Bye, C. Arlen Beam, Duane Benton on 04/17/2012 Ms. Angela L. Campbell for Appellant Mr. Marcus Andrew Burrage and Mr. John S. Courter for Appellee United States of America. Rebuttal by Ms. Angela L. Campbell for Mr. Marcus Andrew Burrage RECORDED [3901965] [11-3602] (LAD)
08/06/2012	OPINION FILED – THE COURT: KERMIT E. BYE, C. ARLEN BEAM and DUANE BENTON. Duane Benton, Authoring Judge (PUBLISHED) [3939256] [11-3602] (YML)
08/06/2012	**JUDGMENT FILED** – The judgment of the Originating Court is AFFIRMED in accordance with

DATE	DOCKET TEXT
	the opinion. KERMIT E. BYE, C. ARLEN BEAM and DUANE BENTON Hrg Apr 2012 [3939261] [11-3602] (YML)
08/19/2012	PETITION for en banc rehearing and also for rehearing by panel filed by Appellant Mr. Marcus Andrew Burrage w/service 08/19/2012 [3943916] [11-3602] (ALC)
09/13/2012	JUDGE ORDER:Denying [3943916-2] petition for en banc rehearing filed by Appellant Mr. Marcus Andrew Burrage. Petition for panel rehearing is also denied. Hrg Apr 2012 [3952984] [11-3602] (YML)
09/20/2012	MANDATE ISSUED. [3955316] [11-3602] (YML)
11/30/2012	U.S. Supreme Court Notice of cert filed in the Supreme Court on 11/27/2012, case No. 12-7515 [3984248] [11-3602] (YML)
	* * * * *
04/29/2013	SUPREME COURT order filed granting leave to proceed in forma pauperis and granting cert petition. Order filed on 04/29/2013 in case No. 12-7515. [4032082] [11-3602] (YML)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

v.

MARCUS ANDREW BURRAGE,
Defendant

ORDER

Before the Court is a Motion for New Trial, filed by Marcus Burrage ("Defendant") on July 12, 2011. Clerk's No. 107. The Government filed a resistance on July 21, 2011. Clerk's No. 108. The matter is fully submitted.

I.

PROCEDURAL BACKGROUND

On April 27, 2011, a grand jury returned a two count Superseding Indictment against Defendant. Clerk's No. 67. Count One charged Defendant with distribution of heroin on or about November 17, 2009, in violation of 21 U.S.C. § 841(b)(1)(C). *See id.* Count Two charged Defendant with distribution of heroin on or about April 14, 2010, the use of which resulted in death or serious bodily injury, in violation of § 841(b)(1)(C). *See id.* Defendant proceeded to trial on these charges and, on June 29, 2011, a jury returned guilty verdicts on both counts. Clerk's No.

104. Defendant now requests a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing that the Court's final jury instructions were improper and that the Government engaged in prosecutorial misconduct.

II.

LAW AND ANALYSIS

Federal Rule of Criminal Procedure 33 provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." This rule enables the Court to grant a new trial if "the evidence weighs so heavily against the verdict that a miscarriage of justice may have occurred." *United States v. Starr*, 533 F.3d 985, 999 (8th Cir. 2008) (internal quotations and citations omitted). "[T]he trial court has wide discretion in deciding whether to grant a new trial in the interest of justice." *United States v. Malloy*, 614 F.3d 852, 862 (8th Cir. 2010) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). Nonetheless, the Eighth Circuit has repeatedly cautioned that district courts "must exercise the Rule 33 authority 'sparingly and with caution.'" *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002) (quoting *United States v. Lacey*, 219 F.3d 779, 783 (8th Cir. 2000)). "This standard 'requires the district court to balance the alleged errors against the record as a whole and evaluate the fairness of the trial.'" *United States v. Carter*, No. 04-0404-CR, 2006 WL 1128740, *3 (W.D. Mo. Apr. 24, 2006) (quoting *United States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988)).

Regarding jury instructions, "[a] defendant is not . . . entitled to a particularly worded instruction." *United States v. Spires*, 628 F.3d 1049, 1053 (8th Cir. 2011) (quoting *United States v. Beale*, 620 F.3d 856, 866

(8th Cir. 2010)). Rather, a district court's "rejection of a proposed instruction is reviewed for abuse of discretion." *Beale*, 620 F.3d at 866 (quoting *United States v. Meads*, 479 F.3d 598, 601 (8th Cir. 2007)). "Under this standard of review, the reviewing court will 'consider whether the instructions correctly state the applicable law.'" *United States v. Johnson*, 403 F. Supp. 2d 721, 831 (N.D. Iowa 2005) (quoting *United States v. Walker*, 428 F.3d 1165, 1171 (8th Cir. 2005)). Further, an erroneous jury instruction is grounds for a new trial "only where an abuse of discretion is prejudicial to one of the parties." *Walker*, 428 F.3d at 1171 (citing *United States v. Whitehead*, 176 F.3d 1030, 1037 (8th Cir.1999)).

In the context of prosecutorial misconduct, the interest of justice requires a new trial when: "1) the prosecutor's remarks or conduct [were] improper; and 2) such remarks or conduct . . . prejudicially affected defendant's substantial rights so as to deprive him of a fair trial." *United States v. Griffith*, 301 F.3d 880, 883 (8th Cir. 2002) (quoting *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000)). When determining whether a defendant was deprived of a fair trial, a court should consider: "1) the cumulative effect of the misconduct; 2) the strength of the properly admitted evidence of the defendant's guilt; and 3) any curative actions taken by the trial court." *Id.* at 884.

A.

Final Jury Instructions

Count Two of the Indictment charged Defendant with distributing heroin, the use of which resulted in death. At trial there was a dispute over how the jury should be instructed regarding the third element of this charge. Defendant requested that the Court

instruct the jury that it had to find "the use of the heroin was the proximate cause of a death." *See* Def.'s Proposed Jury Instruction No. 13 (Clerk's No. 91). Defendant further requested that the Court give two additional instructions defining the terms "resulting in death" and "proximate cause."[1] *See id.* Nos. 14, 15. The Court rejected these proposed instructions and instead, consistent with the applicable Eighth Circuit Model Jury Instruction, instructed the jury that the third element of the crime charged in Count Two was that "[a] death resulted from the use of the heroin." Final Jury Instruction No. 10 (Clerk's No. 102); *see also Manuel of Model Jury Instructions for the District Courts of the Eighth Circuit*, 2011 ed., § 21.841A.1 (long), Notes on Use 3(b). However, the Court also included the following language proposed by the Government:

> For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin dis-

---

[1] Defendant's Proposed Jury Instruction No. 14 stated: "The element 'resulting in death' listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death."

Defendant's Proposed Jury Instruction No. 15 stated:

> As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

> tributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

Final Jury Instruction No. 10. Defendant argues that he is entitled to a new trial because the Court erred by rejecting his proposed instructions and by adopting the Government's "contributing cause" instruction.[2]

Defendant relies on *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010), to support the language proposed in his final jury instructions. In *Hatfield*, a defendant was charged with distributing controlled substances resulting in death or serious bodily injury after several individuals ingested a combination of illegal drugs, some of which had been distributed by the defendant, and subsequently died or suffered serious injury. *See* 591 F.3d at 951. Similar to this case, in *Hatfield* the medical evidence pertaining to two of the victims was inconclusive as to whether

---

[2] Defendant also claims that the Court erred by declined to give his Proposed Jury Instruction No. 16, which stated: "If you find the defendant guilty of distribution of heroin as charged in Count 2, then you must determine, beyond a reasonable doubt, whether Joshua Abraham Banka died as a result of using the heroin distributed by the defendant." The Court did not use this instruction because the Court found it cumulative, as it essentially instructed the jury that if they were to find Defendant guilty of Count Two, they had to find beyond a reasonable doubt that the third element of the crime occurred. The Court believed this was adequately covered in a previous instruction where the jury was informed that they could only find Defendant guilty of Count Two if the Government proved each element of that charge beyond a reasonable doubt. *See* Final Jury Instruction No. 10 (final paragraph instructing on burden of proof).

their death or injury would have occurred had the victims not ingested the illegal substances distributed by the defendant. *See id.* The district court instructed the jury that, in order to find that a death or injury resulted from the substances distributed by the defendant, the substances "need not be the primary cause of death or serious bodily injury" but that they "must at least have played a part in the death or in the serious bodily injury." *Id.* at 947. The Seventh Circuit concluded that the addition of language defining the phrase "resulted from" in the jury instructions required reversal because it did not clarify the requisite level of causation needed for conviction, but rather risked allowing the jury to convict when the controlled substances were not the but-for causation of the death or injury. *Id.* at 951.

As an initial matter, the Court finds that Defendant's reliance on *Hatfield* is largely misplaced. Nowhere in *Hatfield* does it state that a proper jury instruction should include the term "proximate cause," as suggested in Defendant's Proposed Jury Instructions Nos. 13 and 14, or the phrases "played a substantial part" and "contributes substantially to," as suggested in Defendant's Proposed Jury Instruction No. 15. Instead, *Hatfield* simply held it was error "not to eliminate the addition to the statutory language" that attempted to clarify the term "results from." *Id.* at 949. More importantly, the Eighth Circuit has explicitly rejected the notion that death results from the use of a controlled substance only when the controlled substance is the proximate cause of the death. *See United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005) (quoting *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) ("[Section 841(b)] is unambiguous and . . . giving effect to its plain meaning prohibits us from superimposing

upon the statute a forseeability or proximate cause requirement."). Thus, had the Court adopted the "proximate cause" language suggested by Defendant in his Proposed Jury Instruction Nos. 13 and 14, it would have misstated the law and committed reversible error.

The Eighth Circuit has also indicated that the language in Defendant's Proposed Jury Instruction No. 15, "[t]he death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred[,]" overstates the causal connection necessary to show that the use of a controlled substance "resulted in" a death. *See Monnier*, 412 F.3d at 862 (stating that the language, "without which the result would not have occurred" amounted to an improper proximate cause requirement). In *Monnier*, the Eighth Circuit rejected the defendant's contention that "the government had to prove that the [drugs] he had provided to [the victim] w[ere] actually enough to kill her," instead finding that "Congress intended to expose a defendant to a more severe minimum sentence whenever death or serious injury is a consequence of the victim's use of a controlled substance . . . ." *Id.* at 862 (emphasis original, internal citations omitted). Again, the Court did not err by refusing to give Defendant's Proposed Jury Instruction No. 15 because the instruction misstated the law.

On the other hand, *Hatfield* does support Defendant's argument that the Court erred by adding the "contributing cause" language to the final jury instruction. *See* 591 F.3d at 950. ("All that would have been needed to satisfy the [the defendant's objection] was to eliminate the addition to the statutory language, which was a good deal clearer than

the addition and probably clear enough."). However, a district court's choice of jury instructions is error only when the instruction does not correctly state the applicable law, and the applicable law in this case is not *Hatfield*, but that of the Eighth Circuit. *See United States v. Pliego*, 578 F.3d 938, 942 (8th Cir. 2009) (quoting *Walker*, 428 F.3d at 1171). While the Eighth Circuit has not explicitly held that "contributing cause" is the correct standard of causation encompassed in the phrase "death resulted from," it has consistently suggested as much. *See Monnier*, 412 F.3d at 862 ("In any event, pursuant to the district court's instruction the jury found proximate cause beyond a reasonable doubt, which necessarily means that it found *contributory cause*." (emphasis added)); *United States v. Ragland*, 555 F.3d 706, 715 (8th Cir. 2009) (finding evidence sufficient for conviction when it was "uncontested that heroin contributed to [the victim's] death"); see *also United States v. Iossan*, No. 10-2502, 2011 WL 3300683, at *3 (8th Cir. Aug. 3, 2011) (in context of applying sentencing departure where death "resulted from" use of controlled substance, citing with approval *United States v. Swebger*, No. 10-1928, 2011 WL 395951 (3d Cir. Feb. 8, 2011), for proposition that the departure applied "when the fetanyl-laced heroin sold by the defendant was at least a contributing cause of his customer's death"). Thus, the Court's "contributing cause" instruction was not erroneous as it accurately described the law as it exists in the Eighth Circuit.

B.

Prosecutorial Misconduct

Defendant also claims that the Prosecutor made certain statements during his cross-examination of Defendant and during his closing argument that

constituted prosecutorial misconduct. Specifically, Defendant complains that the Prosecutor served as the Government's "earwitness" by playing an audio-recording (hereinafter "the Tape") of a controlled heroin purchase on November 17, 2009, and then commenting that the voice on the Tape sounded like that of Defendant's.[3] Defendant claims that these statements were improper because the Prosecutor made them despite knowing that "the Defendant's expert had informed [defense counsel] that a person could not be identified by the voice heard on the tape[,]" and that they prejudiced the Defendant by "encouraging the jury to serve as their own 'earwitnesses.'" Def.'s Br. at 7. Defendant argues that he suffered further prejudice because, due to the Government's assurances that it would not offer earwitness testimony, Defendant did not arrange for his expert witness to testify and thus was unable to rebut the Prosecutor's statements.

As an initial matter, the Court is not persuaded that the Prosecutor's statements during cross-examination and closing argument were improper. The scope of cross examination is limited to "subject matter of the direct examination and matters affecting the credibility of the witness." Fed. R. Evid.

---

[3] During the cross-examination of Defendant, the Prosecutor asked: "Mr. Burrage, the tone and inflection of the individual heard on that tape selling drugs to Breanne Brown sounds an awful lot like you?" During the Government's closing argument, the Prosecutor said: "Ladies and gentlemen, there's a reason why that individual we just heard on the audio tape of that transaction that occurred on November 17th of 2009 sounds like the Defendant, why the tone is consistent, why the inflection is consistent, why the use of the English language is consistent. And the reason why it's consistent is because that's the Defendant, Marcus Andrew Burrage, on that tape."

611(b). Further, leading questions are proper during cross-examination. *See* Fed. R. Evid. 611©. Here, Defendant testified on direct that he did not sell Breanne Brown heroin on November 17, 2009. Thus, the Government was entitled to ask questions about this subject to challenge the truthfulness of Defendant's testimony. *See United States v. Muhlenbrunch*, 634 F.3d 987, 1001 (8th Cir. 2011) (quoting *United States v. Havens*, 446 U.S. 620, 626-27 (1980) ("[i]t is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.")). The fact that the Prosecutor chose to ask these questions in a leading manner does not make them improper comments on the evidence.[4] Nor were the Prosecutor's statements during his closing argument improper. "A prosecutor must limit the closing argument to the evidence and the reasonable inferences that may be drawn from it." *United States v. Hawkins*, 548 F.3d 1143, 1147 (8th Cir. 2008) (quoting *United States v. Eagle*, 515 F.3d 794, 805 (8th Cir. 2008)). Here, the Prosecutor's statements about the similarity between Defendant's voice and the voice on the Tape was nothing more than argument based on reasonable inferences from the evidence presented to the jury. *See United States v. Mullins*, 446 F.3d 750, 759 (8th Cir. 2006) ("So long as prosecutors do not stray from the evidence and the reasonable infer-

---

[4] The Court is also unpersuaded by Defendant's argument that these questions were improper because the Government knew that the Defendant's expert had concluded that it was not possible to identify the voice by only listening to the Tape. The Court is unaware of—and Defendant had not cited any—law stating that the Government is somehow bound by the opinion of a defense expert.

ences that may be drawn from it, they . . . are free to use colorful and forceful language in their arguments to the jury." (internal citations omitted)); *see also United States v. Lizardo*, 445 F.3d 73 (1d Cir. 2006) ("Prosecutors are free to ask the jury to make reasonable inferences from the evidence submitted at trial[.]" (internal citations omitted)).

However, even if the Prosecutor's statements were improper, they did not affect Defendant's substantial rights so as to deprive him of a fair trial. First of all, the Court is unwilling to accept Defendant's argument that he was unfairly prejudiced because he did not call his expert witness based on the Government's assurance that it would not offer any earwitness testimony. Defendant was well aware prior to trial that the Government intended to offer the Tape of the controlled purchase into evidence. *See* Gov't Exhibit List (Clerk's No. 86); Def.'s Mot. in Limine (Clerk's No. 88) at 5 (seeking to exclude portions of the Tape containing hearsay). Further, the only assurance offered by the Government was that it would not call a witness to identify the Defendant by listening to the voice on the Tape. *See* Def.'s Mot. Ex. D (Clerk's No. 107.4). The Government called no such witness. Thus, the Court does not hold the Prosecutor responsible for Defendant's decision to not call his expert.

More importantly, while the Prosecutor suggested that the voice heard on the Tape was Defendant's, the jurors were the ultimate arbiters of this fact, and they had multiple opportunities to hear both the Tape and Defendant's voice. Furthermore, improper remarks by the prosecution are not grounds for a new trial when the evidence against the defendant is otherwise strong. *See United States v. Bartolotta*, 153

F.3d 875, 878 (8th Cir. 1998). Here, the Government presented substantial evidence aside from the Tape establishing that Defendant sold heroin to Breanne Brown on November 17, 2009. At the trial, Ms. Brown testified that Defendant sold her one gram of heroin while she was inside her vehicle wearing a recording device. Officer Miller also testified that he observed Defendant enter Brown's vehicle immediately prior to the recorded purchase. Given the strength of this additional evidence, the Court finds that the Prosecutor's statements had no more than a minimal effect on the trial.

Finally, whatever prejudicial effects the Prosecutor's statements may have had, they were adequately addressed by the Court's instructions to the jury that "[s]tatements, arguments, questions and comments by lawyers representing the parties in the case are not evidence" and that the jury was to decide whether Defendant had made the statements that he was alleged to have made to the Government's witnesses. *See* Final Jury Instruction Nos. 3 and 15; *see also United States v. Hale*, 1 F.3d 691, 694 (8th Cir. 1993) (holding that the defendant was not denied a fair trial where "[t]he district court's jury instructions helped alleviate any potential prejudice from the prosecutor's remarks by informing the jury that the evidence consisted only of the witnesses' testimony and documents received into evidence and that attorney comments during closing argument were not evidence."). Accordingly, the Court concludes that even if the Prosecutor's statements during cross-examination and closing argument were improper, Defendant is not entitled to a new trial because these remarks did not deprive him of a fair trial.

III.

CONCLUSION

For the reasons stated herein, Defendant's Motion for a new trial (Clerk's No. 107) is DENIED.

IT IS SO ORDERED.

Dated this 18th day of August, 2011.

/s/ Robert W. Pratt
ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Case Number: 4:10-cr-00095-001
USM Number: 12484-030

UNITED STATES OF AMERICA

v.

MARCUS ANDREW BURRAGE

Angela Lynnette Campbell
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) after a plea of not guilty.

One and Two of the Superseding Indictment filed on April 27, 2011

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
[redacted]			
841(b)(1)(C)			
[redacted]			
841(b)(1)(C)	Bodily Injury		
[redacted]			

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

☐ Count(s)_____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 17, 2011
Date of Imposition of Judgment

/s/ Robert W. Pratt
Signature of Judge

Robert W. Pratt, U.S. District Judge
Name of Judge Title of Judge

November 17, 2011
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months on each of Counts One and Two of the Superseding Indictment filed on April 27, 2010, to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

That Defendant be placed as near the States of Illinois and Iowa as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a_____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

three years as to each of Counts One and Two of the Superseding Indictment filed on April 27, 2011, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of prisons.

The defendant shall not commit another federal, state or local crime

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

The defendant shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

The defendant shall submit to a substance abuse evaluation. If treatment is recommended, the defend-

ant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and random urinalysis testing, as directed by the Probation Officer. Participation may also include compliance with a medication regimen. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. The defendant shall not use alcohol or other intoxicants during and after the course of treatment.

If not obtained while in Bureau of Prisons' custody, the defendant shall participate in GED classes as approved by the U.S. Probation Office.

The defendant shall submit to a search of his person, residence, adjacent structures, office or vehicle, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U. S. Marshals Service.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (*AO 245C*) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(m), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]			
TOTALS	$0.00		$0.00

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. ☒ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____ , or

☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of (*e.g., months or years*), to commence ____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of (*e.g., months or years*), to commence ____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-3602

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCUS ANDREW BURRAGE,

Defendant-Appellant.

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: April 17, 2012
Filed: August 6, 2012

Before BYE, BEAM, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Marcus Andrew Burrage of distribution of heroin and distribution of heroin resulting in death, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). The district court[1] sentenced him to 240 months on each count, concurrently. Burrage appeals arguing the court erred by admitting hearsay testi-

---

[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

mony and denying his motions for judgment of acquittal and a new trial. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On November 17, 2009, Breanne Brown – a confidential informant – called Officer Jamie Miller of the Central Iowa Drug Task Force. She said she could purchase heroin that day from "Lil C." Later that day Brown – who was cooperating with law enforcement after being found in possession of marijuana – conducted a controlled buy of heroin from Lil C. Officer Miller watched the buy. He testified at trial that he knew "Lil C" referred to Burrage and recognized him during the sale, but his written report did not list Burrage's name. An electronic device in Brown's purse recorded the transaction and transmitted the audio to the officers. The recording was played at trial. Burrage denied selling heroin to Brown and denied it was his voice on the recording.

Tammy Noragon Banka ("Noragon") testified that she accompanied her husband, Joshua Banka, as he purchased one gram of heroin from "Lil C" on April 14, 2010. Banka used some of the heroin almost immediately. He fell asleep and she helped him home. He woke up around midnight, using heroin then and again around 5:00 a.m., when Noragon went to sleep. Waking up around 10:30 a.m., she found Banka dead in the bathroom, seated on the toilet, slumped into the shower. She called the police. Officers from the Nevada (Iowa) Police Department and the Iowa Division of Criminal Investigations responded and investigated. They found drug paraphernalia and a number of narcotics and prescription medications, including alprazolam, clonazepam, oxycodone, baclofen, heroin, and marijuana. Noragon

testified that Banka was a long-time, multiple drug user and that she saw him use marijuana and oxycodone the day before he died.

Believing Banka's death was related to heroin, the local officers contacted the Drug Task Force, providing them with Noragon's physical description of the person who sold heroin to her husband. Officer Miller sent Burrage's photograph. In a photo lineup conducted by local police, Noragon identified Burrage as the man who sold heroin to Banka. At trial, Noragon again identified Burrage as Lil C.

Dr. Eugene Q. Schwilke, a forensic toxicologist, conducted toxicology tests on Banka's blood and urine. His tests detected multiple drugs, including morphine (a metabolite[2] of heroin), 6-[monoacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam, marijuana metabolites, and oxycodone. He testified that, in his opinion, heroin was a contributing factor to Banka's death, but he could not state that Banka would not have died if he had not taken heroin.

Dr. Jerri McLemore, with the State Medical Examiner's office, conducted Banka's autopsy. Relying on her physical examination of Banka and Dr. Schwilke's toxicology report, she certified the cause of death as "a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." She further testified, "The morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range." Dr. McLemore could

---

[2] Dr. Schwilke testified that a metabolite is what a drug breaks down into in the body.

not state that Banka would not have died if he had not taken heroin, but she did describe death without the heroin as "very less likely."

At the close of the government's evidence, Burrage orally moved for judgment of acquittal under Federal Rule of Criminal Procedure 29, challenging the sufficiency of the evidence to sustain a conviction on either count. The district court denied the motion. Burrage orally renewed the motion at the close of his evidence. The district court again denied the it.

The jury returned a guilty verdict on both counts. Burrage moved for a new trial under Federal Rule of Criminal Procedure 33, alleging erroneous jury instructions and prosecutorial misconduct. The district court denied the motion.

II.

Burrage appeals the district court's denial of his motion for new trial. This court reviews the denial of a motion for new trial for an abuse of discretion. *United States v. Louper-Morris*, 672 F.3d 539, 559 (8th Cir. 2012). "Reversal of a denial of a motion for new trial is rare." *Id.*, *quoting United States v. Perez*, 663 F.3d 387, 391 (8th Cir. 2011).

A.

Burrage challenges the jury instructions related to 21 U.S.C. § 841(b)(1)(C), a penalty provision that increases the minimum sentence for distribution of heroin "if death or serious bodily injury *results from* the use of such substance." (emphasis added). The district court instructed the jury:

INSTRUCTION NO. 10
ELEMENTS OF THE OFFENSE – COUNT TWO –
DISTRIBUTION OF HEROIN
RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count Two of the Indictment, has three essential elements, which are:

1. On or about April 14, 2010, the Defendant intentionally distributed heroin; and
2. At the time of the transfer, the Defendant knew that it was heroin; and
3. A death resulted from the use of the heroin.

For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death[.]

For you to find the Defendant guilty of the crime charged under Count Two the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of this crime under Count Two.

"This court reviews a district court's jury instructions for abuse of discretion and its interpretation of law de novo." *Kahle v. Leonard*, 563 F.3d 736, 741 (8th Cir. 2009). This court will affirm where the instructions, "taken as a whole, . . . fairly and adequately instruct the jurors on the applicable law." *United States v. Spires*, 628 F.3d 1049, 1053 (8th Cir. 2011) (internal quotation marks and citations

omitted). "Notably, a defendant is not entitled to a particularly worded instruction." *Id.* alterations and internal quotation marks omitted). This court "will reverse only if an error in the instructions was prejudicial." *United States v. Yielding*, 657 F.3d 688, 708 (8th Cir. 2011).

1.

Burrage argues that "results from" in § 841(b)(1)(C) requires a showing of "proximate cause." At trial he requested three jury instructions to that effect.[3] "A

---

[3] Burrage's Proposed Jury Instruction No. 13:

ELEMENTS OF THE OFFENSE – COUNT TWO – DISTRIBUTION OF HEROIN RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count 2 of the indictment, has three elements, which are:

One, the defendant intentionally distributed heroin;

Two, at the time of the transfer, the defendant knew that it was heroin; and

Three, the use of the heroin was the proximate cause of a death.

For you to find the defendant guilty of the crime charged under Count 2, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime under Count 2.

Burrage's Proposed Jury Instruction No. 14:

DEFINITION: RESULTING IN DEATH

The element "resulting in death" listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death.

Burrage's Proposed Jury Instruction No. 15:

defendant is entitled to a proposed instruction that conveys the substance of his request if it is supported by the evidence in the case and is a correct statement of the law.'" *United States v. Petters*, 663 F.3d 375, 384 (8th Cir. 2011) (internal quotation marks and alterations omitted), *quoting United States v. Gary*, 341 F.3d 829, 834 (8th Cir. 2003).

The district court did not err in rejecting Burrage's proximate cause instructions, because they do not correctly state the law. In *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), this court held that a showing of "proximate cause" is not required under § 841(b)(1). *Id.* at 972-73. Burrage requests this court overrule *McIntosh*, but only the court sitting en banc can take that action. *See Brock v. Astrue*, 674 F.3d 1062, 1065 (8th Cir. 2012).[4]

DEFINITION: PROXIMATE CAUSE

As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.

A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

[4] Every circuit to address the issue agrees with *McIntosh* on this point. *See United States v. De La Cruz*, 514 F.3d 121, 138 (1st Cir. 2008); *United States v. Robinson*, 167 F.3d 824, 830-31 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139, 144-45 (4th Cir. 1994); *United States v. Houston*, 406 F.3d 1121, 1122-23 (9th Cir. 2005); *United States v. Webb*, 655 F.3d 1238, 1250 (11th Cir. 2011); *cf. United States v. Hatfield*, 591 F.3d 945, 950-51 (7th Cir. 2010) (noting "some misgivings about interpreting 'results from' in the statute to impose strict liability," but

2.

Burrage contends that the district court erred by using "contributing cause" language to define the statute's causation element. However, the instruction is consistent with this court's statement that § 841(b)(1)'s "results from" requirement is met by a "contributing cause." *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), *post-conviction relief granted as to sentencing by* 718 F. Supp. 2d 1040 (D. Neb. 2010). In *Monnier*, the jury, given an instruction "akin to a proximate cause instruction," convicted the defendant of distribution of methamphetamine that resulted in death in violation of § 841(b)(1)(A). The defendant appealed the sufficiency of the evidence. First, this court held that the proximate cause instruction did not accurately state the law after *McIntosh*. *Id.* at 861-62. However, it then affirmed the conviction because "pursuant to the district court's instruction the jury found proximate cause beyond a reasonable doubt, which necessarily means that it found *contributory cause*." *Id.* at 862 (emphasis added). The court then defined "contributing cause" as "[a] factor that – though not the primary cause – plays a part in producing a result." *Id.*, *quoting Black's Law Dictionary* 212 (7th ed. 1999).

Burrage notes that the instructions used by the district court do not appear in the 2011 edition of the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*. However, "[t]he Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful sugges-

---

avoiding the issue because "the defendants [did] not challenge the interpretation of the statute as imposing strict liability on them for death or injury to recipients of their drugs").

tions to assist the district courts." *Bady v. Murphy-Kjos*, 628 F.3d 1000, 1004 (8th Cir. 2011) (alterations in *Bady*), *quoting United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

Burrage also relies on *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In that case, the Seventh Circuit expressly rejected a jury instruction adopting the "contributing cause" language from *Monnier*, endorsed a jury instruction using the statute's language without embellishment, reversed, and remanded for a new trial. *Id.* at 947-51. The Seventh Circuit expressed concern that the district court's elaboration on the statutory language may have confused the jury. *Id.* at 949. The *Hatfield* court distinguished *Monnier* because it "was not quoting from or approving a jury instruction." *Id.* Burrage urges this court to do the same.

Unlike the *Hatfield* court, this panel is bound by *Monnier*'s formulation of the "results from" standard. The jury instructions for Count Two fairly and adequately instructed the jurors. The district court did not abuse its discretion by including the "contributing clause" language. *See Yielding*, 657 F.3d at 708 (reviewing jury instructions that defined statutory terms for an abuse of discretion).

B.

Burrage also argues that he is entitled to a new trial because the prosecutor improperly remarked while cross-examining him – and again during closing arguments – that the voice on the audio recording of the controlled buy sounded like him.

During the direct examination of Burrage, his attorney asked, "Was that you on that recording?," referring to the recording of the controlled buy played

earlier in the trial. He responded, "No, Ma'am." During cross-examination, the prosecutor played the tape and asked, "Mr. Burrage, the tone and inflection of the individual heard on that videotape selling drugs to Breanne Brown sounds an awful lot like you?" Burrage's counsel objected, the court overruled it, and the prosecutor repeated, "It sounds an awful lot like you, doesn't it?" Burrage denied it. The prosecutor continued: "You don't think that was in the same tone?," "The same inflection?," "The same pronunciation?," and "That's you on that tape isn't it?" Burrage answered each question: "No, sir."

During closing argument, the prosecutor stated:

> You know, one of the things that we got by his testimony is that you got to observe him other than just sitting at counsel table. You got to see how he talked, what his inflection was, his use of words and the English language, things along those lines. You were able to hear the inflection in his voice and things of that nature.
>
> And one of the things that they can't get past, no matter how they try and do it, is the audio tape of the first buy. And I'm going to play that for you, you've heard it a couple of times but I'm going to play it again.
>
> I'd ask that you do that now.
>
> (Audio tape played in open court.)
>
> Ladies and gentlemen, there's a reason why that individual we just heard on the audio tape of that transaction that occurred on November 17th of 2009 sounds like the defendant, why the tone is consistent, why the inflection is consistent, why the use of the English language is

> consistent. And the reason why it's consistent is because that's the defendant, Marcus Andrew Burrage, on that tape. He distributed that heroin to Breanne Brown on November 17th of 2009.

Burrage did not object at trial, but raised the issue in his post-verdict motion for a new trial.

This court reviews for an abuse of discretion the denial of a motion for a new trial based on prosecutorial misconduct. *United States v. Thomas*, 664 F.3d 217, 224 (8th Cir. 2011). "To reverse a conviction 'based on prosecutorial misconduct to which there was a proper objection, a defendant must show that (1) the prosecutor's remarks or conduct were improper, and (2) the remarks or conduct affected the defendant's substantial rights so as to deprive him of a fair trial.'" *Id.*, *quoting United States v. Montgomery*, 635 F.3d 1074, 1096-97 (8th Cir. 2011). Because Burrage did not object to the prosecutor's comments during closing argument, the denial of the motion for a new trial as it relates to that comment is reviewed for plain error. *United States v. Kieffer*, 621 F.3d 825, 831 (8th Cir. 2010). To establish plain error, Burrage bears the burden of establishing that the district court's failure to grant him a new trial based on that comment was "(1) error, (2) that is plain, and (3) that affects substantial rights. Even if [Burrage] establishes all three plain-error factors, we may exercise our discretion to notice the forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Martinson*, 419 F.3d 749, 752 (8th Cir. 2005) (internal quotations and citations omitted).

The district court did not abuse its discretion or commit plain error, because the prosecutor's com-

ments were proper. By denying that the voice on the recording was his during direct examination, Burrage opened the door to further questions about it during cross-examination. *See* Fed. R. Evid. 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility."). And, the prosecutor's leading question ("Mr. Burrage, the tone and inflection of the individual heard on that videotape selling drugs to Breanne Brown sounds an awful lot like you?") was appropriate on cross. *See* Fed. R. Evid. 611(c) ("Ordinarily, the court should allow leading questions . . . on cross-examination . . . ."). The prosecutor did not improperly comment on the evidence or testify as an expert witness.

The prosecutor's comments during closing were also proper. "A prosecutor must limit the closing argument to the evidence and the reasonable inferences that may be drawn from it." *United States v. Eagle*, 515 F.3d 794, 805 (8th Cir. 2008). By testifying at trial, Burrage gave the jury ample opportunity to hear his voice. A jury is competent to compare voices without expert testimony. *United States v. Samuels*, 543 F.3d 1013, 1015-16 (8th Cir. 2008) (holding that the jury "could judge for themselves" whether two voices were the same); *United States v. Donaldson*, 110 Fed. Appx. 603, 610 (6th Cir. 2004) (unpublished) (finding no prosecutorial misconduct where the prosecutor's closing argument invited the jury to compare recordings with the non-testifying defendant's voice heard during random outbursts throughout the trial); *United States v. Cambindo Valencia*, 609 F.2d 603, 640 (2d Cir. 1979) ("[V]oice identification is not generally considered to be an area where expertise is important.").

Burrage further contests that the prosecutor's question and comments breached a pre-trial agreement between the parties that no "earwitness" expert testimony would be offered. Because of this agreement – memorialized in an email exchange – Burrage did not seek funds to offer the testimony of his own expert earwitness. However, the prosecutor did not breach the agreement. In the emails, the prosecutor agreed not to have "someone who just reviewed the audiotape com[e] in and say[] that [Burrage]'s voice is the voice on the tape." The prosecutor did not call any such witness.

The district court did not abuse its discretion in denying Burrage's motion for a new trial.

III.

A.

Burrage appeals the district court's denial of his motion for a judgment of acquittal. This court reviews de novo the denial of a motion for a judgment of acquittal based on the sufficiency of the evidence to sustain a conviction. *United States v. Aldridge*, 664 F.3d 705, 715 (8th Cir. 2011).

> On review, evidence is viewed most favorably to the verdict, giving it the benefit of all reasonable inferences. Reversal is appropriate only where no reasonable jury could find all the elements beyond a reasonable doubt. This court does not weigh the credibility of the witnesses or the evidence. The jury has the sole responsibility to resolve conflicts or contradictions in testimony, and credibility determinations are resolved in favor of the verdict.

Id. (citations omitted).

Burrage challenges the sufficiency of the evidence for each count. First, he argues that no reasonable jury could find beyond a reasonable doubt that he distributed heroin to Brown (an element of Count One) or Banka (an element of Count Two). Specifically, he challenges the credibility of the testimony of Brown, the investigating officers, and Noragon. However, "a witness's credibility is for the jury to decide," *United States v. Thompson*, ___ F.3d ___, 2012 WL 3023471, at *6 (8th Cir. July 25, 2012), and "[t]he jury's credibility determinations are virtually unreviewable on appeal," *Aldridge*, 664 F.3d at 715. As described in Part I, there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that he distributed heroin to Brown and Banka.

Burrage also asserts that no reasonable jury could find beyond a reasonable doubt that Banka's death resulted from the heroin distributed by Burrage (an element of Count Two). Burrage states that B's death "resulted from" a mixed drug intoxication, not the heroin. He insists that Banka's death could not have resulted from the heroin because Drs. Schwilke and McLemore could not testify that Banka would not have died if he had not used the heroin. However, both doctors testified that the heroin was a "contributing cause" of his death, which satisfies the *Monnier* standard. *Monnier*, 412 F.3d at 862. Further, Dr. McLemore testified that the heroin metabolite was the only drug present in levels above the therapeutic range and that death without the heroin was "very less likely." "[G]iving [the verdict] the benefit of all reasonable inferences," a reasonable jury could find Banka's death resulted from the heroin beyond a reasonable doubt. *Aldridge*, 664 F.3d at 715; *cf. United States v. Washington*, 596 F.3d 926, 942-44

(8th Cir. 2010) (finding sufficient evidence that death resulted from each of two drugs involved in a "mixed narcotic overdose" in order to support conviction on two separate counts (one for each drug) under 18 U.S.C. § 841(b)(1)(C)).

B.

According to Burrage, the district court should have granted a new trial because the verdict was against the weight of the evidence. "The district court has broad, but limited, discretion to grant or deny a motion for a new trial based on the sufficiency of the evidence, and it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *United States v. Vega*, 676 F.3d 708, 722 (8th Cir. 2012) (internal quotation marks omitted). However, Burrage did not preserve this issue for appeal by including it in his post-trial motion for a new trial.[5] Therefore, this court reviews the issue for plain error. *See Martinson*, 419 F.3d at 752; Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

To establish plain error, Burrage "bears the burden of establishing that the district court's failure to grant [him] a new trial [based on the weight of the evidence] sua sponte was (1) error, (2) that is

---

[5] The fact that Burrage raised sufficiency of the evidence in his motion for a judgment of acquittal does not preserve the issue for review as a motion for new trial. Martinson, 419 F.3d at 752 ("Motions for judgment of acquittal are different motions with different substantive standards than motions for a new trial, and we will not construe the filing of one to preserve for our review claims of error relating to the other.").

plain, and (3) that affects substantial rights. Even if [Burrage] establishes all three plain-error factors, we may exercise our discretion to notice the forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Martinson*, 419 F.3d at 752 (internal quotations and citations omitted). Here, the district court did not err. The district court did not have the power to grant a motion for a new trial on grounds that were not raised by Burrage in his timely-filed motion under Federal Rule of Criminal Procedure 33. *Id.* ("[T]he district court did not err because it does not have the power under Rule 33 to order a new trial sua sponte."); *United States v. Flynn*, 196 F.3d 927, 932 (8th Cir. 1999) ("[A]dditional grounds for relief raised after a timely-filed motion [for a new trial] are procedurally barred.").

IV.

Burrage argues that the district court abused its discretion by allowing inadmissible hearsay testimony. This court reviews "a district court's evidentiary rulings for abuse of discretion, according substantial deference to the district court's rulings." *United States v. Van Elsen*, 652 F.3d 955, 958 (8th Cir. 2011). This court will only reverse "if an error was not harmless." *United States v. White Bull*, 646 F.3d 1082, 1091 (8th Cir. 2011). "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c) (current version effective Dec. 1, 2011).

Officer Miller testified:

Q. What was your reasoning in sending [Burrage's] photograph to Sergeant Martinez?

A. The cause of death that we had been notified was possibly because of a heroin overdose.

[BURRAGE'S COUNSEL]: Objection, Your Honor, this is calling for –

. . .

It's all hearsay.

[PROSECUTOR]: He's testifying, Your Honor, not for the truth of the matter asserted but the subsequent conduct that he took based upon the information that he had received.

THE COURT: On that basis, the objection is overruled.

BY [PROSECUTOR]:

Q. Why did you send that picture to the Nevada Police Department?

A. I sent the photograph due to the fact of through the investigation it was learned that the individual died of a heroin overdose. Heroin is not real prevalent in our community. It's making a resurgence, due I guess to the – due to the fact that working narcotics on a full-time basis there is a very limited – I guess a very limited supply base for individuals who are selling heroin. So knowing that we had maybe two individuals, one in particular, that was selling heroin, I sent a photograph of that individual to Sergeant Martinez.

The district court did not abuse its discretion because (1) the part of Officer Miller's testimony Burrage attacks on appeal is not an out-of-court statement, (2) even if it was, the statement was not offered for its truth, and (3) any error was harmless.

Burrage characterizes Officer Miller's response as "I'd heard Burrage was our city's main heroin dealer so I sent his picture." That does not accurately reflect his testimony, which recites his work in narcotics as the foundation for identifying Burrage as a possible suspect in Banka's death. There is no suggestion that Miller relied on an out-of-court statement for that conclusion. The only out-of-court statement potentially included in Miller's testimony is the information relayed to him by the Nevada police department about Banka's death and its link to heroin – a portion of the testimony Burrage does not challenge.

The testimony is also admissible because "[a]n out of court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way." *United States v. Brown*, 560 F.3d 754, 764 (8th Cir. 2009). Burrage believes that the purported nonhearsay reason masked the real purpose: "to try to prejudice the jury into believing the truth in the statement – that Burrage was a heroin dealer." However, "he did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." *Id.*

Burrage asks that this court follow *United States v. Evans*, 216 F.3d 80 (D.C. Cir. 2000). An FBI agent there testified that his office "had received . . . information that Mr. Evans was involved in drug trafficking." *Id.* at 84. The record showed that the FBI received that information from an informant who

did not testify at trial and was not available for cross-examination. *Id.* at 85-86. Officer Miller's testimony here is not similar to the FBI agent's testimony in *Evans*, because it does not allude to some unavailable informant. Burrage had the opportunity to cross-examine Sergeant Martinez about his decision to contact the task force about Banka's death and, the opportunity to cross-examine Officer Miller about his decision to send the photograph to Martinez. *Cf. id.* at 85 ("The problem with hearsay is that it deprives the defendant of the opportunity to cross-examine the person who uttered the statement at issue.").

Even if the district court erred in admitting the testimony, the error was harmless. "A trial error is harmless 'if other evidence to the same effect was properly before the jury.'" *United States v. Gettel*, 474 F.3d 1081, 1090 (8th Cir. 2007), *quoting United States v. White*, 11 F.3d 1446, 1451 (8th Cir. 1993). In other testimony, Officer Miller explained his office's investigation and identification of Burrage as a potential heroin dealer. Sergeant Martinez and several other officers testified at trial about their investigation into Banka's death, its possible link with heroin, and their decision to contact Officer Miller's task force.

* * * * *

The judgment of the district court is affirmed.

United States Court of Appeals
For The Eighth Circuit

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

August 06, 2012

Ms. Angela L. Campbell
DICKEY & CAMPBELL
301 E. Walnut Street
Suite 1
Des Moines, IA 50309

RE: 11-3602 United States v. Marcus Burrage

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required.

No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Mr. Marcus Andrew Burrage
Mr. John S. Courter
Ms. Rebecca Goodgame Ebinger
Ms. Marjorie Krahn

District Court/Agency Case Number(s):
4:10-cr-00095-RP-1

United States Court of Appeals
For The Eighth Circuit

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

August 06, 2012

West Publishing
Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 11-3602 United States v. Marcus Burrage

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Angela L. Campbell, of Des Moines, IA

Counsel who presented argument on behalf of the appellee was John S. Courter, AUSA, of Des Moines, IA. The following attorney(s) appeared on the appellee brief; Rebecca Goodgame Ebinger, AUSA, of Des Moines, IA.

The judge who heard the case in the district court was Honorable Robert W. Pratt. The judgment of the district court was entered on November 17, 2011.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s):
4:10-cr-00095-RP-1

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume I

EXCERPTS OF TESTIMONY OF
OFFICER J. MILLER

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Monday, June 27, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[84] ladies and gentlemen of the jury, raise your right hand to be sworn.

JAMIE J. MILLER,
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. COURTER:

Q. Would you state your full name and spell your last name.

A. Jamie J. Miller, M-i-l-l-e-r.

Q. Where are you employed?

A. I'm employed with the city of Ames, Iowa as a police officer.

Q. How long have you been with the Ames PD?

A. With the Ames Police Department since April of 2000.

Q. Okay. Were you involved in law enforcement or employed in another—with another police department prior to Ames?

A. Yes, Sir. I've been a police officer in Iowa since 1992.

Q. Okay. Can you briefly describe your background, training and experience in law enforcement.

A. Yes, Sir. I am a graduate of the Iowa Law Enforcement Academy, studied basic law enforcement aspects during the academy.

Since my career in law enforcement I've received training in numerous aspects of law enforcement, dealing from everything from drug recognition, drug identification, certified field training officer, evidence technician.

I'm also currently assigned as an operator with the

* * * * *

[91] Q. Okay. I want to talk to you specifically about a transaction that occurred on November 17th of 2009.

Was a transaction set up for that day?

A. Yes, there was.

Q. How was that transaction initially set up?

A. I had been contacted by Ms. Brown, and she had stated that she had made contact with an individual that she referred to as Lil C and had arranged for a transaction of Ecstasy pills from him.

Q. Was that common procedure, to have her make direct contact rather than contact in a law enforcement-controlled setting?

A. A lot of times that occurs. There are times when we would like to be present when that happens, but we don't spend of course 24 hours a day with the individual, so a lot of those contacts that they have with individuals come at odd hours and odd times.

Q. Okay. When she said the name Lil C, did that have any significance to you as a narcotics investigator at that time?

A. It did, yes.

Q. Okay. What significance did it have to you?

A. I have heard that street name or nickname during drug investigations and knew who that referred to.

Q. Okay. Who did that refer to?

A. That referred to an individual that we knew was a Marcus Burrage.

* * * * *

[114] A. Yes.

Q. Did she tell you that she had—that he had been staying at her house?

A. No, Sir.

Q. Did she identify him to you as Marcus Burrage before you showed her the photo of him?

A. As I testified, she had identified him to us as Lil C and then also as the first name of Marcus.

Q. Now, going on to the baggie that you received as part of the controlled purchase, it's your testimony that that baggie had a controlled substances in it; is that correct?

A. That is correct, yes, Sir.

Q. How many bags was it that were obtained?

A. There was one.

Q. Did you or any law enforcement officer test that baggie for the presence of fingerprints?

A. No, Sir.

Q. You didn't arrest the male subject after the controlled buy, did you, Officer?

A. No, Sir, I did not.

Q. In fact, you did let him drive away even though you knew that he was selling heroin?

A. Yes, Sir.

Q. And because you let him drive away, at that point you couldn't search the car to see if there was more heroin there?

* * * * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume I

EXCERPT OF TESTIMONY OF
OFFICER S. SMITH

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Monday, June 27, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[125] DIRECT EXAMINATION

BY MR. TAYLOR:

Q. Can you please state your full name and spell your last name.

A. Steven B. Smith, S-m-i-t-h.

Q. And what is your occupation?

A. Police officer for the city of Nevada.

Q. Were you so employed in April of 2010?

A. Yes.

Q. How long have you been employed there?

A. 32 years.

Q. In that same office?

A. Yes.

Q. Have you worked anywhere else?

A. No.

Q. Can you briefly describe your background, training and experience as a law enforcement officer.

A. I've attended the Iowa Law Enforcement Academy.

Q. When was that?

A. Back in '83.

THE COURT: Now, Officer, can you pull the mike close to you. We'll hear you better if you do so. Thank you.

Q. Okay. Let's now turn to the morning of Thursday, April 15th, 2010. Did you receive a radio traffic call that morning?

A. Yes, I did.

[126] Q. Can you briefly describe this traffic call.

A. The radio traffic came over the fire frequency, which I scan that frequency along with the county. I

heard dispatch put out a call reference a 32-year-old male not breathing.

Q. Did they tell you the address of this residence?

A. Yes.

Q. What was the address?

A. 1423 K Avenue in Nevada.

Q. Do you know around what time that was?

A. I believe it was around 10:34 in the morning.

Q. Did you go to 1423 K Avenue after you received this?

A. Yes, I did.

Q. Can you briefly explain what happened when you arrived at the scene?

A. I met with a female individual standing on the front step.

Q. Do you know who that is now?

A. Her name was Tammy Noragon.

Q. Okay. And what happened next?

A. Advised why I was there, and she reported her husband was in the bathroom.

Q. And did you see her husband?

A. Yes, I did.

Q. Where was he?

A. He was in the restroom.

Q. In the restroom of the residence?

[127] A. Yes.

Q. Okay. Did it appear that the decedent was breathing?

A. No, it did not.

Q. Did it seem like he had been dead for some time?

A. I believe so. He was purple in color.

Q. Okay. And what did you do generally when you approached the decedent?

A. I just—I checked to see if I could see any signs of life.

Q. And did you— This was in the bathroom; right?

A. Yes.

Q. Did you notice any other objects in the bathroom consistent with drug use?

A. Yes, I did.

Q. What were those?

A. I observed a syringe laying on the bathroom sink.

Q. Was there anything else?

A. There was a baggie of some substance in it, laying next to it.

Q. And do you recall where in the bathroom these items were located?

A. Pardon me?

Q. Do you know where in the bathroom these items were located?

A. Yes.

Q. Where were they, the items that you saw?

A. In the bathroom. They were on the sink—top of the sink, [128] yes.

Q. And what did you do next?

A. As I was looking at the—at her husband, I turned around and a first responder was there along with the fire chief, and I indicated to them that it appeared that this male person was deceased.

Q. Did you speak with anyone else, any other police officers after that?

A. I went into the living room and then phoned our police chief.

Q. Who is that police chief?

A. Michael Tupper.

Q. And what did you do next?

A. After contacting him, he stated that he was aware of the situation, he would meet me there.

Q. Did he arrive at the scene?

A. Yes.

Q. What did you— What did you do after he arrived?

A. I explained to him what information I had, and he reported to me that—to take the wife up to the police department and interview her to get some more information from her.

Q. And that wife was Tammy Noragon?

A. Yes.

Q. Approximately what time did this interview occur?

A. I would say around 11.

[129] Q. And this interview occurred at the Nevada Police Station?

A. Yes, it was.

Q. Did you record the interview?

A. Yes.

Q. Was an audio recording—

A. She was placed in the interview room, and, yes, there was, I believe.

Q. Okay. Was there a visual recording as well?

A. Yes.

Q. Who was present during that interview?

A. Right at the beginning it was just me, but then Sergeant Ricardo Martinez arrived, and then he more or less took over, and I sat in on the interview.

Q. Generally—just very generally what topics did you discuss with Tammy Noragon during that interview?

A. I just asked her, you know, what went on, what she knew what went on with her husband.

Q. So you asked her about his—her husband's drug use the day before?

A. Yes.

Q. Did you talk to her at all about how—or whether she met the drug dealer?

A. Yes.

Q. Did she describe the drug dealer in any way?

A. Yes, she did.

[130] Q. Okay. Just further going through the topics that you went over with Tammy Noragon, did she talk at all about the drug paraphernalia throughout the house?

A. Yes.

MR. TAYLOR: Nothing further.

THE COURT: All right. Thank you.

Is there any cross-examination?

MR. PIPER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PIPER:

Q. Officer Smith, you testified that you have attended the Iowa Law Enforcement Academy; correct?

A. Yes.

Q. And have you had other periodic training throughout your career?

A. Yes, I have.

Q. As part of your training, are you taught the importance of writing accurate reports of what you observe in potential crime scenes?

A. Yes.

Q. And would you say that it is important to accurately record what a witness tells you during an investigation?

A. As far as I know, yes.

Q. And in your training and your experience why is it important to record accurately what someone tells you during an [131] investigation?

A. To get the important facts of the situation.

Q. Whenever you interview a witness in a case that you're investigating, do you write up a report for your superiors?

A. Yes, I did.

Q. And in fact I see that you had written a report in this case. Were you the first person—the first law enforcement official to respond to the 9-1-1 call at the scene?

A. Yes, I was.

Q. And when you entered the home, did you notice—you've already testified that you noticed a baggie that you suspected contained a controlled substance; correct?

A. Yes. That was in the restroom, yes.

Q. In the bathroom. And you also observed a syringe?

A. Yes, I did.

Q. Did you observe any other materials that to you seemed to indicate drug use?

A. Not that I can recall, no.

Q. Were there any animals present in the house when you entered?

A. No, there was not.

Q. You didn't see any dogs in the house?

A. I later understood that there were two in the home.

Q. I see. Did you secure any of the items that you saw for later fingerprinting?

[132] A. No, I did not.

Q. Okay. And did you observe any cell phones there in the house?

A. No, I did not.

MR. PIPER: Thank you. I don't have any further questions.

THE COURT: Any redirect, Mr. Taylor?

MR. TAYLOR: Nothing further, Your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Do you want to call your next witness.

MR. COURTER: We'd call Officer Dave Lois, Your Honor.

THE COURT: Officer Lois, if you would step in the witness box, Sir, and then after doing so, if you would look at the ladies and gentlemen of the jury, raise your right hand to be sworn, please. Please stand, raise your right hand.

DAVID MARK LOIS, GOVERNMENT'S WITNESS, SWORN

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MR. COURTER:

Q. Would you state your full name and spell your last name, please.

A. David Mark Lois, L-o-i-s.

Q. Where are you employed?

A. With the Dubuque Police Department.

* * * * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume I

EXCERPT OF TESTIMONY OF
OFFICER D. LOIS

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Monday, June 27, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[133] Q. How long have you been with Dubuque PD?

A. Since November 2010.

Q. Prior to joining the Dubuque Police Department were you involved in any other law enforcement capacity?

A. Yes. I worked with the Nevada Police Department for 3 1/2 years.

Q. Okay. When did you start with Nevada PD?

A. Started with them in October of 2007.

Q. And you were with them continuously until you went to Dubuque?

A. Yes.

Q. Can you just briefly describe your background, training and experience in law enforcement.

A. I completed the Iowa Law Enforcement Academy in April of 2008, and completed the field training program through Nevada, and was certified as a defensive tactics instructor and then an ASP baton instructor. And after being employed by the Dubuque Police Department, I completed their field training program as well.

Q. What were your general duties while you were with Nevada PD?

A. Patrol and my own investigations.

Q. How big a department was that at that time?

A. Nine; nine total.

Q. Nine sworn officers?

A. Yes.

[134] Q. Is that a fairly small department?

A. Yes.

Q. I want to take you back to April, the middle of April of 2010. Were you involved in the death investigation involving Joshua Banka?

A. Yes.

Q. How did you first become involved in that investigation?

A. In the morning at the about 11 o'clock, I believe, Chief Michael Tupper called me up and informed me of the death investigation and asked me to come on duty to assist with it.

Q. And what day was that?

A. It would have been April 15th; Thursday, April 15th, I believe.

Q. Of 2010?

A. Yes.

Q. Where did you go?

A. Went to the residence at 1423 K Avenue.

Q. Okay. There in Nevada?

A. Yes.

Q. What were your—What assignment was given to you when you arrived on scene?

A. I was there to secure the residence while they obtained a search warrant for the residence.

Q. How many officers were there at the time you arrived, just in general?

[135] A. I believe just the chief and a couple of paramedics, no other officers.

Q. So it would have been you, Chief Tupper and a couple of paramedics?

A. Yes.

Q. Was a state search warrant in fact secured for the residence of Mr. Banka?

A. Yes.

Q. And who lived there with Mr. Banka?

A. Tammy Noragon.

Q. Do you know what the relationship was between those two?

A. As I understand, they were married.

Q. Okay. What were your specific duties once the search warrant had been approved by a state court judge?

A. I packaged and secured the evidence and documented the evidence that was found.

Q. At that residence?

A. At the residence.

Q. Did you prepare a written inventory of what had been seized from the residence?

A. Yes.

Q. Does that inventory list items seized and where they were found?

A. Yes.

Q. Why don't you outline to the jury the specific items that [136] were seized from the Banka/Noragon residence and where they were found?

A. Three empty syringes from the vehicle, one full syringe from the vehicle, a bottle of alprazolam found on the shelf in the south bedroom. One bottle of Baclofen. It was prescribed to a David Letsch, L-e-t-s-c-h,

was on the floor in the north side of the bed; a clear bag containing heroin that was found in the bathroom; one bottle of clonazepam, it was prescribed to Joshua Banka in the bathroom; one bottle of hydrocodone, prescribed to Joshua Banka, in the bathroom; three unused syringes in the bathroom, and a can of Mountain Dew from the vanity, three syringes from the bathroom and a multicolor marijuana smoking bong in the living room.

Q. Where was that found?

A. I believe it was found in the living room.

Q. Now, those first two items, you listed out three empty syringes and the one full syringe. It says it's from the vehicle; correct?

A. Yes.

Q. Are we talking those were found in the same vehicle?

A. Same vehicle. Yes, it was all found in the same vehicle.

Q. And do you recall what sort of vehicle they were found in?

A. Not specifically, offhand. It was a black two door, I believe.

Q. Okay. After you had catalogued all he items that were

* * * * *

[180] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume II

EXCERPTS OF TESTIMONY OF
T. NORAGON BANKA

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Tuesday, June 28, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge and a jury.

* * * * *

[182] P R O C E E D I N G S

THE COURT: Please be seated.

Good morning, ladies and gentlemen.

When we left off, Mr. Courter and Mr. Taylor were still presenting for the government, so I'll recognize Mr. Courter.

Mr. Courter.

MR. COURTER: Thank you, Your Honor. The government would call Tammy Noragon.

THE COURT: Ms. Noragon, if you would step into the witness box and then please stand and look at the ladies and gentlemen of the jury and raise your right hand, please to be sworn.

TAMMY NORAGON BANKA,
GOVERNMENT'S WITNESS, SWORN

THE COURT: Please be seated.

Counsel, you may proceed.

MR. COURTER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. COURTER:

Q. Would you state your full name and spell your last name, please.

A. Tammy Noragon Banka, N-o-r-a-g-o-n B-a-n-k-a.

Q. How old are you, Ma'am?

A. 31.

Q. Where do you currently live?

[183] A. Columbia, Tennessee.

Q. How long have you lived in Colombia?

A. Since March of 2011.

Q. Were you married to an individual by the name of Joshua Banka?

A. Yes, I was.

Q. When did you get married to Mr. Banka?

A. That was February 7th of 2009.

Q. When did Mr. Banka die?

A. April 15th, 2010.

Q. How long had you known Mr. Banka?

A. We had been together about 4 1/2 years.

Q. Prior to the April of 2010?

A. Yes.

THE COURT: Can you, Jury, hear all right?

Pull that closer to you. Thank you.

Excuse me, Mr. Courter.

Q. Where did you and Mr. Banka meet as far as state, city?

A. Maple Hill, Kansas.

Q. Okay. Have you been— Were you together from that time up until April of 2010?

A. Yes, that's correct.

Q. Where all did you live during that time period?

A. During that time we lived in Wichita, Kansas until October of 2009. At that point we moved to Boone, Iowa, lived there for [184] about a month or so, then moved to Waukee, Iowa, lived there about a month or so, and then moved to Nevada in March of 2010.

Q. Okay. And you were there from March of 2010 till when?

A. Till August 2010.

Q. Okay. Did you live in the same location during your time there in Nevada?

A. Yes.

Q. And where was that located?

A. That was at 1423 K Avenue.

Q. Okay. Who all lived at that residence?

A. It would have been me, Joshua and then our dogs.

Q. How many dogs did you have?

A. We had four.

Q. Okay. Can you describe to us what kind of person Mr. Banka was?

A. He was a very down-to-earth person, got along with everybody, but also had his share of problems with drugs and ADHD.

Q. And we're going to talk about that. Specifically what do you have personal knowledge of as it relates to his drug use?

A. He had problems with his drug use off and on since he had been probably about 17 years old. Marijuana was his drug of choice. He had gotten injured in October—no, January of 2009. He had some nerve damage done to his back, and at that point he started taking OxyContin for the pain, and that caused him to [185] get addicted to pain killers at that point. When those pain killers weren't well enough, then he switched to crack and then eventually went to heroin.

Q. How long did you know him to use heroin prior to April, the middle of April 2010?

A. He had used heroin—started probably in September of 2009, used it up until October of 2009 when we moved, and then hadn't used it since, until April 15—until April 14th, 2010.

Q. Was your husband's use of heroin, was that any factor in the move from Wichita, Kansas to Iowa?

A. That was the main reason why we had left is because he was getting to the point where he was using drugs on a constant basis.

Q. Including heroin?

A. Including heroin, crack and OxyContin. He would use it on a daily basis, and it was causing a lot of problems for him and a lot of problems for us in my job, so I quit my job, and that's when we moved to Iowa because he always said Iowa was a place where he could do better.

Q. Okay. From the time that you moved from Wichita to Iowa in October of 2009 through April 14th of 2010, did you ever personally witness your husband using any heroin?

A. No.

Q. Was he using other drugs during that time period?

A. Yes, he was.

[186] Q. What time period—excuse me, what sort of drugs or type of drugs was he using between October 2009 and April 14th of 2010?

A. He was a regular user of marijuana. He had prescriptions for Clonazepam and Xanax, which are anxiety drugs, and then he would use OxyContin too, and Lortab if he could find them.

Q. Okay. In the weeks leading up to your husband's death, did he have some problems with law enforcement that were related to substance abuse?

A. Yes, he did.

Q. And can you tell the jury what those problems were and his contact with law enforcement?

A. He actually had two separate incidents. The first one was on March 3 of 2010. He had gotten off work, had went to a bar in downtown Ames, had a few too many drinks and went to drive home to where we were living in Waukee at the time and actually wrecked his Pontiac on 35. He had actually hit the guardrail and got wrapped up.

Q. On Interstate 35?

A. On Interstate 35.

Q. Okay.

A. And was then taken into custody for OWI and marijuana possession at that point.

Q. Okay. And was there another incident shortly after that?

A. There was another incident shortly after on March 17th, 2010.

* * * * *

[191] Dangerous Curves?

A. My husband had met Lil C previously about a week before. My husband was actually in downtown Ames and had been drinking and got attempted to—got robbed by an African-American with a stick, who had hit him, and Josh not having a license and no way to get home had went to Dangerous Curves to try to find a ride home.

Q. Was that one of his regular—

A. No, it wasn't. He had went there because he knew one of the dancers there. She came into the pet store all the time.

Q. Okay.

A. So he went to Dangerous Curves and was there, and Lil C came into the bar, and the bouncers were going to beat him up because they thought that was the person who had tried to rob Josh, and Josh had said, no, that's not him.

Q. He wasn't— Lil C wasn't involved in that earlier incident with your husband?

A. No. It was somebody else.

Q. Okay. What time of the day did you meet him?

A. It was probably between 6 and 7 o'clock at night.

Q. How was he introduced to you?

A. He wasn't technically introduced to me. He was pointed out to me by my husband.

Q. Okay.

A. And I was standing there while they kind of talked a little [192] bit.

Q. While who kind of talked a little bit?

A. Well, him—Lil C and Josh talked.

Q. Was any of that conversation about drugs?

A. At that point, no.

Q. Okay. Approximately how long were you in the same bar or same location with your husband and Lil C?

A. We were probably there all together probably 4 hours. Lil C was there probably for a couple of hours and then left for a little bit and came back.

Q. Okay. During that time did you have an opportunity to observe his physical stature and his facial features?

A. Yes.

Q. Okay. To the best of your knowledge, did your husband purchase any drugs from Lil C the night of April 12th, 2010?

A. No, he did not.

Q. Okay. I want to move you forward just a couple of days to April 14th of 2010. Did your husband buy some heroin that day?

A. Yes, he did.

Q. Okay. Did you have any discussion with your husband concerning why he wanted to buy heroin if he was lined up to go to drug treatment?

A. Yeah.

Q. Why was that?

A. It was because he was going to treatment, he wanted to do it [193] one last time.

Q. Okay. Were you present when he purchased heroin on April 12th of 2010?

A. Yes. I was driving the vehicle.

Q. Okay. And we'll get to that in a second, but who did he purchase the heroin from?

A. From Lil C.

Q. The same individual seated at counsel table?

A. Yes.

Q. Okay. Where was that transaction going to take place?

A. That occurred in the HyVee parking lot off Lincoln Way in Ames. It would have been on the west side of Ames.

Q. Okay. And what time approximately did that occur?

A. About 2 o'clock in the afternoon.

Q. Okay. Why don't you walk us through how you and your husband got from—or how you got to the location of this HyVee store.

A. Okay. Lil C and my husband had been kind of texting back and forth during the day. Lil C eventually texted and said "Come on out," so we actually drove from Nevada, Iowa to Ames to meet him in that parking lot.

Q. What vehicle were you and your husband in?

A. We were driving an Oldsmobile Bravada.

Q. Who was driving?

A. I was.

[194] Q. And where was your husband seated?

A. In the passenger seat.

Q. How long had you and your husband owned that Bravada prior to April 14th of '05?

A. Probably less than a month.

Q. Okay.

A. Because he had actually totaled our previous car in the March 3rd accident.

Q. Okay. So this was a new vehicle to you and him?

A. Uh-huh.

Q. Okay. Did you buy it from a dealer or a private party?

A. From a dealer.

Q. Okay. Why don't you describe to us how you entered the HyVee area.

A. Well, we came in on Lincoln Way, headed west, turned into the HyVee parking lot, that main entrance, drove in front of the store and then went to the back that butts up against Lincoln Way and backed into a stall and waited there.

Q. During that time was your husband always present in the vehicle with you?

A. Yes, he was.

Q. At any time did he leave the vehicle or leave your sight?

A. No.

Q. Was he doing any texting at that time?

A. Yes, he was.

[195] Q. Do you know who he was texting?

A. Lil C.

Q. Okay. What happened after you had arrived and parked and the texting between your husband and Lil C had taken place?

A. We were probably sitting there probably for about 20 or 30 minutes. He was texting, kind of "Where are you?" Eventually Lil C came up, walking through the parking lot from the back of the store.

Q. From the back of the HyVee?

A. Uh-huh.

Q. What happened next?

A. He then got into the rear passenger seat.

Q. Okay. Were you able see him?

A. Yes, I was.

Q. Did you turn around and look at him?

A. Yeah.

Q. Any doubt that the individual that got in the back of your vehicle on April 14th of 2010 is the defendant in this case?

A. No doubt.

Q. What happened after Lil C entered your vehicle?

A. That's when the drug transaction occurred.

Q. Why don't you describe to us or tell the jury how the drug transaction occurred.

A. Since they had already kind of worked out a deal, they kind of knew the price and how much, so Josh had given him $200 for [196] one gram of heroin.

Q. And did you see the money and the drugs exchange hands between your husband—

A. Yes.

Q. — and the defendant?

Approximately how long did this drug transaction take from start to finish?

A. Probably 3 minutes, probably—maybe even less. It wasn't too long of a transaction. They pretty much just exchanged—talked a little bit, and he left.

Q. Okay. When you say "he left," who is "he"?

A. Lil C.

Q. Where did he go after he left your vehicle?

A. He started walking towards the HyVee.

Q. Okay. What did you and your husband do?

A. At that point we were getting ready to leave, and my husband's like, "Hold on just a second. Go up there and go up and drive by him, I want to ask him one more question."

Q. Okay. What happened next?

A. I then pulled up before—to where Lil C was walking and stopped so my husband could ask him. He had wanted to know if Lil C would be able to locate where any marijuana would be.

Q. Where was Lil C in relationship to the vehicle at this time?

A. He was on the driver's side.

Q. And you were driving?

[197] A. Uh-huh. So he was kind of speaking through—over me to Josh in the passenger's seat.

Q. Was your window open?

A. Yes.

Q. Okay. Were you able to observe what he was wearing at that time?

A. Yes.

Q. Okay. What was he wearing?

A. It was a light blue jumpsuit, kind of—I think it was a Nike jumpsuit.

Q. Okay. You had indicated that your husband asked Lil C a question about more drugs; is that correct?

A. Correct.

Q. And what drug did he ask about this time?

A. Marijuana.

Q. Okay. What was Lil C's response?

A. He said he didn't know where he would get some, but he would be in contact with Josh later that day.

Q. Okay. Any further contact with Lil C at that time?

A. No.

Q. After that conversation, did you see where Lil C went?

A. He went into the HyVee store.

Q. Did you see him walk into the HyVee store?

A. Uh-huh.

Q. Is that a yes?

[198] A. Yes.

Q. Okay. What did you do after Lil C entered the HyVee store?

A. At that point we left the HyVee parking lot, and my husband Josh had wanted to shoot up, so we went over probably not even a block and a half down on the left side there was a Chinese food restaurant, and we pulled into that parking lot.

Q. And what happened after you pulled into that parking lot?

A. At that time Josh had gotten a metal pop can, had put some heroin in there with some water, cooked it, and then shot it up in the car.

Q. Is that how he used the heroin, the procedure you just mentioned?

A. Yes, he injected it.

Q. Okay. And the cooking part of that, can you describe how that works, if you know.

A. Yeah. He would actually take the bottom of a regular aluminum pop can where it has kind of a little circle bowl. He would put it in there, add some water to it, cook it underneath the metal, and then he would take the filter of a cigarette, tear off a little piece, put that into the liquid and then put the syringe into the cotton and take it out that way.

Q. Okay. And did you observe him do this on April 14th of 2010?

A. Yes, I did.

Q. Okay. Where did he inject the heroin in his body? What was [199] the entry point?

A. I believe it would have been his right arm, right there [indicating].

Q. Right in the crook of his elbow?

A. Right in the crook.

Q. Okay. What happened next?

A. At that point he got a little groggy and kind of was like whoa and then fell asleep.

Q. Okay. And what did you do?

A. At that point I stayed there for a half hour because I was just kind of concerned about him because he was kind of, you know, making a little—couple of snoring noises, so I just kind of waited there to make sure everything was okay.

Once he wasn't making those and was a little responsive but a little tired and groggy, I went home to Nevada with him in the vehicle.

Q. And drove him home?

A. Yes.

Q. During the course of your marriage had you seen him under the influence of heroin before?

A. Yes, I had.

Q. And prior to April 14th of 2010 when was the last time you had seen him under the influence of heroin?

A. It would have been sometime in the month of October 2009.

Q. Okay. Do you recall just approximately what time you and [200] your husband arrived back at your residence in Nevada?

A. It was probably between 4 and 5, because we had waited at the HyVee parking lot for a while.

Q. Okay. Now, did you make any stops between Ames and your home in Nevada?

A. No.

Q. What happened after you arrived back at your house in Nevada?

A. After we arrived back, I got him out of the vehicle, and he went to bed.

Q. Okay. Was he able to move under his own power or did you have to assist him?

A. I had to assist him a little bit because he was stumbling.

Q. Okay. And so you put him into bed?

A. Yeah. He put himself into bed once he got into the house.

Q. Okay. And what time did this occur, approximately?

A. Probably between 4 and 5.

Q. In the afternoon?

A. In the afternoon.

Q. Okay. What happened next?

A. After that he was actually asleep until about midnight.

Q. Okay. So midnight on the 14th?

A. Uh-huh.

Q. What happened next?

A. At that point he woke up and was complaining that he was in [201] a lot of pain and kind of dealt with it for a little bit, and then between 12 and 1 o'clock, that's when he shot up again.

Q. Shot up heroin again?

A. Yes.

Q. And did you observe him do that?

A. Yes.

Q. Where was he located in your house at that time?

A. He was located in the bathroom.

Q. Okay. So you saw him shoot up there?

A. Yes, I did.

Q. Did he follow the same procedure you had previously discussed with the Mountain Dew can?

A. Uh-huh.

Q. Okay.

A. Exact same.

Q. Where was the injection site at that point?

A. I think at that point it was in the other arm but same place.

Q. So in the crook of his arm?

A. Same place, yeah.

Q. Okay. What happened next?

A. At that point he went to the bathroom and then went in, laid back down again.

Q. Okay. What did you do?

A. I was still up, so I actually went and laid back in the bed [202] where we had TV and was watching TV while he was sleeping.

Q. What happened next?

A. He was probably asleep until about 3 o'clock. At that point he got up, was kind of—didn't really know where he was at and went to the bathroom and then came back to bed.

Q. Okay. Do you know if he used additional heroin on that trip to the bathroom?

A. I don't think he did because he wasn't in there very long.

Q. Okay. How long does it take from start to finish to prepare it and cook it and —

A. To actually cook it and to prepare it, it would probably take—prepare it, cook it, shoot it up, probably about 10 minutes altogether.

Q. Okay. And you had seen him do that a number of times. Is that fair to say?

A. Yes, uh-huh.

Q. What happened next, Ms. Noragon?

A. At that point, once at 3 o'clock when he woke up and then went to the bathroom and came back to bed, I was still up, I was watching TV. He woke up again about 5 o'clock.

Q. Okay. And what did he do?

A. At that point he went into the bathroom again.

Q. Okay. What happened in the bathroom?

A. And that time in the bathroom he did shoot up.

Q. Okay. Did you observe him shoot up?

[203] A. Yes, I did. I observed him—well, I didn't observe him actually shooting up at the time. I observed him cooking it.

Q. Okay. And preparing to shoot up?

A. Preparing it.

Q. Okay. And approximately what time was that?

A. That was about 5 o'clock in the morning on April 15th.

Q. Okay. What happened next?

A. At that point he stayed in the bathroom and actually was using the bathroom at that point. I explained to him I was tired because it was 5 o'clock in the morning, I was ready to go to bed. He was breathing okay and talking to me and said that he would be in bed shortly.

Q. Okay. Was he standing in the bathroom, sitting in the bathroom?

A. He was sitting on the toilet.

Q. Okay. What happened next?

A. At that point I went to bed, had set my alarm for about 10:30 because he had to be at work that next day, and I was always the one responsible for driving him there. So I set my alarm for 10:30, and when I woke up at 10:30 on the morning on April 15th, he wasn't laying in the bed.

Q. What did you do you when you realized he wasn't in bed with you?

A. When I realized he wasn't in bed, I called out to him, but he didn't answer, so I went around looking for him, and I found [204] him in the bathroom.

Q. Okay. Can you describe to us just in general the scene that you found, Ms. Noragon.

A. When I found him, he had—actually had all—had his boxers off because he had been sitting on the toilet. He was actually slumped over, still kind of partially sitting on the toilet but slumped over and was halfway in and out of the bathtub/shower that we had right there.

Q. Okay. So the bathtub/shower was right next to the stool?

A. Right. Uh-huh.

Q. How did he physically appear to you at that point?

A. At that point he was real purple and real blotchy and red.

Q. Okay.

A. And there was some liquid on the ground.

Q. Could you detect any signs of breathing or respiration at that point in time?

A. No, I couldn't. At that point you could tell by the coloration of his skin.

Q. Did you believe he was dead at that time?

A. Yeah.

Q. What did you do after you made that discovery?

A. After I realized that discovery, I called 911 and talked to the Nevada police dispatcher.

Q. Okay.

A. And they suggested—they're like, "Well, can you perform [205] CPR?" I was, "Well, I kind of think it's too late," but I went and tried it, and his jaw was actually locked, so I couldn't have done anything.

Q. What happened next?

A. At that point that's when Officer Steve Smith came in. He was the first one on the scene.

Q. Okay.

A. I told him where Josh was located, and he went into the bathroom.

Q. Okay. And approximately what time was this, do you recall?

A. About 10:30 in the morning.

Q. That's when you woke up and found him?

A. Yeah.

Q. Okay.

A. I think I made the call at like 10:37.

Q. Was your house fairly small?

A. Yes, it is.

Q. How long did it take you to locate him once you had gotten up that morning?

A. Probably less than 30 seconds. It was probably only about 12 feet from the bedroom to the bathroom.

Q. Okay. Were there obviously signs of drug use there in the bathroom?

A. Yes. There was still some syringes and that pop can lid and the liner on the bathroom counter.

[206] Q. Was the heroin there?

A. Yes, it was.

Q. That heroin, was that the heroin that he had purchased from Lil C the day before?

A. Yes.

Q. Did you see how it was packaged when it was purchased on the 14th from Lil C?

A. It was just in a little storage bag.

Q. Okay.

A. Clear storage bag that had been tied up.

Q. Were you interviewed by the officers concerning the things that you've testified to here today?

A. Yes.

Q. Okay. Did you give them a description of Lil C?

A. Yes, I did.

Q. Okay. Did you have any idea what his real name was or did you just know him as Lil C?

A. I just knew him as Lil C.

Q. Okay. Now, the officers executed a search warrant at your residence later that day; correct?

A. Uh-huh, yes.

Q. Okay. Would you agree with me that there were a number of different types of drugs that were found in the residence?

A. Yes.

Q. What all types of drugs were found there that you know of?

[207] A. There was the heroin, there was syringes, a couple of OxyContin that he had gotten from somebody else. There was his prescription medication, the Xanax, and the Klonopin. There was marijuana. There was—and then a couple of marijuana paraphernalia, like a pipe and a bong.

Q. Okay.

A. And probably some rolling papers.

Q. According to the inventory in this case there was also a bottle of Declofen. Are you familiar with that?

A. Yeah.

Q. And do you know what Declofen is?

A. I believe—I don't know what it was for, but he used it because it helped with his anxiety and the pain. I think it was kind of a nerve pain.

Q. The reason I'm asking that is because that prescription was made out to an individual by the name of David Letsch?

A. Uh-huh.

Q. Do you know David Letsch?

A. Yes, I do.

Q. And who is David Letsch?

A. David Letsch was the person that we had actually lived with when we moved to Iowa back in October 2009 in Boone, and he had been friends with Josh probably for about 15 years off and on.

Q. So you had lived there at the residence with your husband and Mr. Letsch?

[208] A. Uh-huh.

Q. And was he married?

A. Yes, he was.

Q. So who all lived in that house?

A. It was a David Letsch, his wife Sara Letsch, Joshua and myself.

Q. Okay. Do you know why the prescription bottle for Mr. Letsch was found in your residence or how it got to be there?

A. Yeah. We were actually at David's house earlier that morning.

Q. Okay.

A. And at that point Josh was trying to get some pills from David but he had said no, and so Josh kind of got him distracted and took them.

Q. So he stole the pills?

A. He stole the pills from David.

Q. Okay. At some point were you presented a photo lineup by one of the Nevada PD officers?

A. Yes, I was, on that Friday, April 16th.

Q. Okay. And what time of the day did that occur, Ma'am, do you recall?

A. It was probably about 8 o'clock.

Q. In the evening?

A. In the evening, yes.

* * * * *

[236] A. Yes.

Q. And you're driving?

A. Yes.

Q. Right. Because he doesn't have his license at this point?

A. Right.

Q. Do you have a license?

A. Yes, I do.

Q. Was it valid?

A. At that point I was suspended.

Q. Oh, you didn't have a valid license either?

A. No.

Q. But you were driving anyway?

A. Yes.

Q. Okay. So you drove him over to David and Sara's. Did you go there with the intentions of getting some OxyContin?

A. Josh was hoping to ask him for some, yes.

Q. And were you there when he asked for them?

A. I was in the house. I was not there between the conversation between them.

Q. Okay. But you're aware that David said no?

A. Yes.

Q. And you were aware that Josh stole OxyContins?

A. When we left, yes.

Q. Were you present when David confronted him about stealing the OxyContin?

[237] A. Dave actually hadn't confronted him about it.

Q. Why did you tell the police when you were interviewed that he was confronted by David?

A. David had suspected it but hadn't confronted him at that point.

Actually I do believe that Josh talked to him later on that day, and David had mentioned that he was missing a couple of pills, and Josh had just—was kind of like "I don't know what happened to them."

Q. Well, it wasn't a couple of pills, was it?

A. I don't remember the exact number of pills that he took.

Q. It was like 20, wasn't it?

A. I don't remember.

Q. You didn't see them or you don't remember?

A. No, I didn't see them, and I don't remember.

Q. Okay. So Josh just tells you he steals pills, he doesn't show them to you?

A. Right.

Q. So you have no idea how many OxyContin he has?

A. No.

Q. Do you know how many he uses that day?

A. No, I do not.

Q. Do you see him use OxyContin that day?

A. Yes.

Q. You didn't tell us about that. So why don't you tell us [238] when you first saw him using OxyContin on April 14th.

A. That was early in the morning on April 14th, probably about 10 o'clock in the morning.

Q. What time did you go to David and Sara's?

A. It was probably about 9 o'clock.

Q. Okay. And he steals the OxyContin and you come home?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. And he uses the OxyContin then?

A. Right.

Q. Do you see him use them?

A. Yes, at that point I did.

Q. Did you see how many OxyContin he had at that point?

A. No. He still had the rest of them in his pocket.

Q. Okay. In a bag?

A. I think he actually might have had a pill bottle.

Q. Okay. So he cooks the OxyContin like he cooks heroin; right?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. Have you ever used OxyContin?

A. No, I haven't.

Q. Now, have you seen Josh use OxyContin?

[239] A. Yes, I have.

Q. Does it have the same effect on him that using heroin does?

A. Close. It doesn't make him as drowsy and disoriented, kind of more mellows him out.

Q. Both of them make you sleepy and relaxed; right?

A. The OxyContin did a little bit, but the heroin made him more sleepy. The OxyContin, because he was in pain for his back, it would kind of actually just mellow him out.

Q. Okay. Did he crush up the OxyContin that he stole from David and shoot them into his arm?

A. Yes, he did.

Q. Where was his injection site?

A. Crook of the arm. I don't remember which arm it was.

Q. Same general place as when he shot up the heroin?

A. Yeah.

Q. Where is that needle at?

A. I believe he probably threw it away in the trash.

Q. Okay. So 10 a.m. he shoots up with OxyContins, and then this is all getting ready for him to go to drug treatment; right?

A. Yes.

Q. Do you have any problems with the fact that he's shooting up OxyContins?

A. Yes, I did.

Q. Do you have any problem that he's smoking marijuana?

[240] A. A little bit, but it—also I didn't because of his ADHD and anxiety, it actually mellowed him out pretty much where he wasn't freaking out.

Q. So if he didn't use, he freaked out?

A. Yes. He would have a lot of panic attacks.

Q. So unless he was using drugs, he would have panic attacks and freak out?

A. Uh-huh.

Q. Is that yes?

A. Yes, it is.

Q. Okay. So he shoots up the OxyContin at 9 a.m. Then you guys go and buy heroin?

A. Uh-huh.

Q. Is that yes?

A. Yes. At about 2 o'clock.

Q. Okay. And he goes and buys heroin for the first time since October 2009?

A. Correct.

Q. Hadn't used it at all?

A. No.

Q. Had he gotten over his withdrawal symptoms?

A. At that point, yes.

Q. Okay. So he just decides to go and buy heroin for the first time in 6 months; right?

A. Right.

[241] Q. And he's so excited about it that he decides to use it out in the open in the car immediately after purchasing it?

A. Uh-huh.

Q. Did you have a discussion about how dangerous that is to do?

A. Yes.

Q. But he just needed to use it right away?

A. Uh-huh.

Q. Even though he was no longer addicted to it?

A. Yes.

Q. Even though he has gotten over his withdrawals?

A. Yes.

Q. He just decided "I want to use it right now in this parking lot out in the open in the car"?

A. Yes. Josh was—once he had his mind set on something, he was going to do it.

Q. Okay. So he buys the heroin from someone he had just met?

A. Uh-huh.

Q. Right?

A. Right.

Q. Not from any of his buddies?

A. I mean he had met Lil C prior to that day, but not from any of his buddies because his buddies didn't know where to get it and also wouldn't give it to him.

Q. Okay. They would give him marijuana but nothing else?

A. Yes.

[242] Q. But he had used with them before?

A. Before when he was— Not since we had moved up there.

Q. But he knows where to get drugs in Iowa?

A. Yes, he knew people.

Q. But instead, he buys heroin, according to you, from a guy he has never met before for the first time? That's the first purchase he ever makes from him?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. Okay.

A. He would actually do that when we were living in Kansas. If he wanted something, he had a way of being able to look at somebody and tell if they used drugs or not, and so he would go up to random people sometimes.

Q. So it's your testimony that you had never met Marcus Burrage before the Dangerous Curves?

A. Right.

Q. And it's your testimony you've never used drugs with him?

A. Not with Lil C, no.

Q. And it's your testimony you've never smoked weed with him?

A. No.

Q. And it's your testimony that you've never gotten weed from him?

A. No.

[243] Q. And it's your testimony that he's not friends with you and your husband; right?

A. No.

Q. So why does your husband invite him to go fishing with you?

A. That's probably because he was drunk at that time that we were at the bar, and my husband is very friendly, and because he was getting drugs from him, my husband would have wanted to hang out with him.

Q. Well, at the bar he wasn't getting drugs from him; right? You told us he didn't get drugs from him on the parking lot?

A. On Monday, April 12th, he had wanted to get drugs from him but at the time Lil C said he didn't have any and he would be heading to Chicago later that night and be able to pick some up there.

Q. Well, that's interesting because you just told us on direct that they did not discuss drugs in the Dangerous Curves in front of you on April 12th?

A. It was not in front of me. They were by themselves. It was Josh came up to me after they had talked and told me.

Q. Okay. So they did discuss drugs?

A. Yes.

Q. In Dangerous Curves?

A. Yes.

Q. So that's different from what you told us earlier; right?

A. Yeah. It wasn't actually in front of me. I did not hear [244] them directly talking about it.

Q. Okay. Now, you told us then that you used it in the car, and he sort of falls asleep and starts snoring?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. And then eventually you drive him home; right?

A. Yes.

Q. Does he use any drugs on that drive home?

A. No.

Q. Did he use any other drugs at the time he shot up the heroin in the car?

A. No.

Q. Did he use anything in the car on your way to go buy the heroin?

A. No.

Q. Okay. And the only thing he had used at this point is he had shot up some OxyContin at 9 a.m.?

A. Right.

Q. And he hadn't done any other drugs?

A. No, he hadn't.

Q. So he gets home, he's sort of groggy; right?

A. Uh-huh.

Q. And he lays down and falls asleep until midnight you said?

A. Right.

[245] Q. When did you guys eat that day?

A. We didn't eat that day.

Q. Not even the food that Sara and David gave you?

A. No.

Q. Did you eat breakfast?

A. No.

Q. No lunch?

A. No.

Q. No supper?

A. No.

Q. When was the last time Josh had eaten?

A. It probably would have been that Tuesday night.

Q. Okay. Do you remember what you ate?

A. No, I have no idea.

Q. Okay. So he hadn't eaten for over 24 hours, probably 30 hours by the time he died?

A. Yeah, probably pretty close. He might have had a snack in between them, but actual full meal, no.

Q. Okay. So then you drive him home. He's basically unconscious. Does he walk himself into the house?

A. Yes, he does. He stumbles a little bit.

Q. Does he bring the drugs with him?

A. He does.

Q. He comes into the house. Does he use any drugs in the house at that time?

[246] A. At that point, no.

Q. Does he use any drugs between the time he enters the house and midnight?

A. No.

Q. So midnight he gets up; right?

A. Right.

Q. And he shoots up again?

A. Correct.

Q. And you see that?

A. Yes.

Q. And you watch him inject it?

A. Yes.

Q. And that's heroin?

A. Yes.

Q. Are you concerned that he's been passed out for hours and immediately gets up and shoots heroin?

A. Yes. I had been concerned, and that's why I was still awake, and I was paying attention and watching him to make sure that everything was okay.

Q. Why didn't you take the drugs away?

A. Because Josh was the type of person that if I would have taken them away, he would have left and found somewhere else to get it.

Q. Okay. Because he had other places to get it; right?

A. No, he didn't know of any other places; but he would walk [247] up—he would go to like the neighborhood that is known for selling it and find something if he wanted it bad enough.

Q. Okay. So he shoots up again at midnight. Does he use any other drugs at midnight?

A. No.

Q. Do you use drugs at all on April 14th?

A. I might have smoked some marijuana early in the morning, but that was it.

Q. Okay. So do you remember whether you smoked marijuana before you went to David and Sara's?

A. Before, no.

Q. How about at David and Sara's?

A. At David and Sara's, we did at David and Sara's yes.

Q. So you and— Does David and Sara smoke with you?

A. David does, yes.

Q. Okay. Who provided the marijuana?

A. David at that point.

Q. Okay. And does Josh smoke marijuana?

A. Yes.

Q. Okay. And then you leave?

A. Yes.

Q. And then he goes back and uses the OxyContin he's stolen?

A. Right.

Q. Okay. So let's go back to midnight. Is that the only time he uses marijuana that day?

[248] A. Yes.

Q. It would have been like 9 a.m.?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. Okay. So he goes back to the house, and midnight he shoots up with heroin. Does he use any OxyContin?

A. No, he does not.

Q. And he falls back asleep, and you say now that he got up at 5 and shot up again?

A. Yes.

Q. And you saw that?

A. Yes. Well, I didn't actually see him shoot up. I saw that he was preparing it.

Q. So you know he shot up three different times?

A. Yes.

Q. And you saw him preparing it?

A. Yes.

Q. How do you know he's preparing heroin and not OxyContin?

A. Because since he had the heroin, he wouldn't have used the OxyContin.

Q. So once he gets heroin, he doesn't use OxyContin?

A. If he had the heroin, which was stronger, he would have known that that would have—you know, the effect would have been stronger, and it would have helped better.

[249] Q. Let me talk about when he wakes up because you tell us he wakes up in pain?

A. Uh-huh.

Q. Right?

A. At midnight, yes.

Q. And it's pretty bad pain —

A. Yeah.

Q. — right? Even though he already used the pain killers OxyContin that day; right?

A. Uh-huh.

Q. And he had smoked marijuana, which dulls pain; right?

A. Yes.

Q. And he had used heroin, which dulls pain?

A. Yes.

Q. But he wakes up in extreme pain?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. Had you ever seen him in that much pain before?

A. Yes, I had.

Q. When you interview with the police why do you tell them it's different than other pain you've seen him in before?

A. I don't know. Because it was still—he was just complaining that his back was hurting him, and he was real sore and had problems getting up, and I had seen him in that type of pain [250] when he had gotten his back injured earlier.

Q. And then he used oxys to take care of back pain, doesn't he?

A. Yes, he does.

Q. So he gets up in pain, and he goes into the bathroom?

A. Yes.

Q. And shoots up again?

A. Yes.

Q. Now, you told us that he came back to bed at some point during that time; right?

A. Right.

Q. How many times does he come into bed and go back to the bathroom, do you know?

A. He got up, he went to the bathroom at 12, at 3, and at 5 that I'm aware of.

Q. Okay.

A. At 3 it was just to go to the bathroom because he—I could hear him going to the bathroom from where I was laying and plus he wasn't in there long enough to do anything.

Q. Okay. Why did you tell police that you didn't know he came back to the bed? You just thought he was because there was liquid on the pillow?

A. That's actually when I woke up. When I went to bed at 5 o'clock, he was actually still in the bathroom going to the bathroom, said everything was okay. I asked him, I said, "How are you doing?" And he's like, "I'm doing fine." He was [251] breathing okay, talking normal.

So at that point it was 5 o'clock in the morning. I was tired, so I went to bed. When I woke up in the morning at 10:30, that's when I noticed there had been—there was spilled soda over there, and I

noticed he had checked his voice mail at about 6 o'clock.

Q. Okay. So between 5 and 6 he came back into the bedroom?

A. Yes.

Q. But you didn't know it at the time?

A. At that point no, I was asleep.

Q. So do you know what drug he uses when he gets up at 6 and goes back into the bathroom?

A. I have no idea.

Q. Because you don't see that; right?

A. Right.

Q. But that would have been the last thing he used before he died?

A. Yes.

Q. Now, I want to talk a little bit about David Letsch's incident. You told us that David provided you with marijuana?

A. Yes.

Q. And a few days prior he had provided you with OxyContin?

A. Yes.

Q. And Josh had stolen both Percocet and OxyContin from him; right?

[252] A. Correct.

Q. And you were aware that David called the police; right?

A. Yes, uh-huh.

Q. And Josh was aware of that; right?

A. Yes.

Q. Because a police officer contacted him on April 14th, didn't he?

A. I am not aware that a police officer contacted him.

Q. Well, then how does Josh know that the police had been contacted?

A. Because when him and David talked later on that day, David mentioned that he didn't know where these drugs were, that he was going to file a police report.

Q. Well, after your husband dies, do you listen to all of his voice mails?

A. Yes, and I don't recall one being on there from the police department.

Q. So you're not aware that Officer Dave Powers leaves a message for your husband about the stolen oxys on April 14th?

A. No, I'm not.

Q. So that must mean that Josh deleted the message?

A. Yes, he could have.

MR. COURTER: Objection; calls for speculation.

THE COURT: Sustained.

BY MS. CAMPBELL:

[253] Q. So if that was true, that was going to be the third major problem?

A. Yes.

MR. COURTER: Again objection; speculation.

THE COURT: Sustained.

BY MS. CAMPBELL:

Q. Well, if Josh was arrested for the stolen OxyContin— You knew he stole OxyContin; right?

A. Uh-huh.

Q. And you knew that David had called the police; right?

A. Yes.

Q. That was going to be the third charge?

A. Yes, it would have been.

Q. In a month?

A. Uh-huh.

Q. Right?

A. Yes.

Q. And Josh is kind of unstable, isn't he?

A. Yes, he's had problems.

Q. Okay. Has he been suicidal before that you know of?

A. He has been in the past, yes.

Q. And he has mental health issues?

A. Uh-huh.

Q. Is that yes?

A. Yes.

[254] Q. And he's overdosed before?

A. Yes.

Q. And on April 15th he had two pending charges, one of which was a felony, he had crashed two cars, he had a substance abuse evaluation that was going to be required eventually by the courts?

A. Uh-huh.

Q. He was under investigation for stealing OxyContin from his buddy; right? He has a part-time, minimum wage job; right?

A. Yeah.

Q. And he had also just found out he had another daughter, hadn't he?

A. Yes, he had.

Q. Was he suicidal?

A. At that point, no.

MS. CAMPBELL: I don't have anything further, Your Honor.

THE COURT: Mr. Courter, do you have any redirect?

MR. COURTER: No, Your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: You want to call your next witness.

MR. COURTER: Your Honor, the next witness is going to be fairly lengthy. You want to take the morning break at this time?

* * * * *

[180] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume II

EXCERPT OF TESTIMONY OF
DR. McLEMORE

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Tuesday, June 28, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge and a jury.

* * * * *

[256] afraid to tell either the CSO or my law clerk, and we'll make those available to you. Okay.

Mr. Courter, go ahead.

MR. COURTER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. COURTER:

Q. Would you state your full name and spell your last name, please.

A. My name is Dr. Jerri McLemore, M-c cap L-e-m-o-r-e.

Q. You're a medical doctor; is that correct?

A. That's correct.

MR. COURTER: May I approach, Your Honor?

THE COURT: You may.

Q. Dr. McLemore, I handed you what has been marked Government Exhibit 3-9 for identification. Do you recognize what that is?

A. Yes.

Q. And what is Government's Exhibit 3-9?

A. This is a copy of my curriculum vitae dealing with my work history and my education.

MR. COURTER: Move to admit 3-9.

MS. CAMPBELL: No objection.

THE COURT: Received.

(Government's Exhibit No. 3-9 was offered and received into evidence.)

BY MR. COURTER:

[257] Q. Obviously your curriculum vitae is lengthy. Can you give us the high points of your background, training and experience in the medical profession?

A. Yes. I completed my medical degree at the University of Kansas in Kansas City, Kansas. I then completed a residency training program in both anatomic and clinical pathology at the University of

New Mexico Health Sciences Center in Albuquerque, New Mexico.

I completed a fellowship in forensic pathology at the office of the medical investigator that's affiliated with the University of New Mexico Health Sciences Center in Albuquerque, New Mexico. I'm board certified by the American Board of Pathology in clinical, anatomic and forensic pathology.

I was a faculty member, an assistant professor, at the University of New Mexico Health Sciences Center in the office of the medical investigator.

I then took a position as an associate state medical examiner at the Iowa office of the state medical examiner in Ankeny, Iowa and currently I'm employed at Wake Forest University Baptist Medical Center in the department of pathology, where I teach on the autopsy service and perform medical examiner cases.

Q. How long were you employed with the Iowa Medical Examiner's office?

A. I was employed at that office from September of 2003 until [258] May of 2010.

Q. Okay. During the course of your career, can you give us the general number of the autopsies that you've done in conjunction with your professional duties.

A. At my time in New Mexico, Iowa and currently at North Carolina I have supervised and performed approximately 3500 autopsies.

Q. Out of those 3500 autopsies, do you have an approximate number of those that related to drug overdoses?

A. The cases that dealt with drugs as causing or contributing to death is roughly about a third of the cases.

Q. Okay. So somewhere in the area of 1200 autopsies total relating to drug overdoses as a contributing factor in death?

A. That's correct.

Q. In April of 2010 while you were with the Iowa Medical Examiner's office did you perform an autopsy on an individual by the name of Joshua Banka?

A. Yes.

Q. And on what day did you perform that autopsy?

A. That autopsy was performed on April 16th, 2010.

MR. COURTER: Okay. May I approach, Your Honor?

THE COURT: You may.

Q. I've handed you what's been marked Government Exhibit 3-1 for identification. Do you recognize what that document is?

A. Yes.

[259] Q. What is 3-1?

A. This is a copy of the finalized autopsy report that details my examination of findings at the autopsy, including any diagrams that I made in conjunction with the autopsy and ancillary testing, in this case the toxicology report.

MR. COURTER: Move to admit Government Exhibit 3-1 Your Honor.

MS. CAMPBELL: No objection.

THE COURT: Received.

(Government's Exhibit No. 3-1 was offered and received into evidence.)

MR. COURTER: May I approach again?

THE COURT: You may.

BY MR. COURTER:

Q. I've just handed you a stack of photographs marked Government Exhibits 3-2 through 3-6. Do you recognize those photographs?

A. Yes, I do.

Q. Were those photographs taken in conjunction with the performance of your autopsy on the body of Joshua Banka?

A. Yes, they were.

MR. COURTER: Move to admit 3-2 through 3-6, Your Honor.

MS. CAMPBELL: No objection.

THE COURT: Received.

[260] (Government's Exhibit No. 3-2 through 3-6 were offered and received into evidence.)

BY MR. COURTER:

Q. Can you tell us how a body is transported to the medical examiner's facility in Ankeny for your examination.

A. The body in general is transported from the site where the body was pronounced dead to the office in Ankeny, Iowa by a transporter, with the body usually in a body bag.

MR. COURTER: And could I move to publish some of these photographs, Your Honor?

THE COURT: You may.

Q. Showing you, Doctor, what has been admitted as Government Exhibit 3-2, do you recognize what that photo is?

A. Yes, I do.

Q. Can you describe to the jury what that photo depicts.

A. That's a photograph of the outside of the body bag in the area where the zipper of the bag is.

The blue object there is a seal that is affixed to the zippers of the body bag so that they cannot be opened unless the seal is broken.

There's also an identification tag with the decedent's name written on the tag or other identifying descriptions.

There is a unique autopsy number that is unique for the Iowa office of the state medical examiner for that particular body.

[261] Q. So is there a unique identifier for each body that comes in to be autopsied?

A. Yes.

Q. Prior to performing the autopsy in this case, did you review any reports or receive any information from law enforcement that was involved in investigating Mr. Banka's death?

A. Yes, I did.

Q. And what did you review?

A. Typically in any type of death that is reported to the office and in this case the county medical examiner and/or a representative from the investigating agency will call the office to speak with one of our death investigators and provide us with preliminary findings or circumstances surrounding the death.

Q. What were the preliminary circumstances or findings that you were provided prior to you performing the autopsy on Mr. Banka?

A. The circumstances surrounding the death were reported to us as a man who had a history of substance use and who had been hospitalized for prior overdoses, was found in his bathroom, slumped over the toilet, half off the toilet, with drug paraphernalia surrounding him.

Q. I'm showing you what's been admitted as Government's Exhibit 3-3. What does Government Exhibit 3-3 depict?

A. This is the condition of the person's body. It's still in the body bag. The body bag has been opened up, and the body has [262] been photographed as we have received it.

Q. After the body bag is opened and the body is there in full view, what are the initial steps that you begin in performing your medical examination?

A. In general, an autopsy examination consists of an external examination, where the outside of the body is viewed and documentation of the physical characteristics of the body is performed—documentation like the color of the hair or if there's no hair, any facial hair, the color of the eyes, tattoos

or other possibly identifying marks on the skin are detailed.

In this examination any injuries that might be noted on the body on the outside are also documented, either by on a diagram, putting those injuries on a diagram, or by photographing those injuries or important or pertinent findings.

This is done while the body is still within the body bag so that any evidence that needs to be collected can be collected at that time, such as hairs or fibers that may pose a need for trial or for establishment of cause and manner of death.

After the external examination and any possible evidence is collected on the outside of the body, the body is then cleaned and washed so that obscuring blood or dirt or anything on the outside of the body is cleaned away, and then the body is looked at again on the outside to again look for any injuries or any natural disease processes that might be the [263] cause of death or contribute to death.

Once this is done, an internal examination is performed. And the internal examination consists of looking at the organs in the head—the brain; looking at the organs within the chest cavity and looking at the organs within the abdominal cavity, begin looking at the condition of the organs, whether there's natural disease processes or injuries that may have caused or contributed to death.

At this point specimens are collected for the possibility of further ancillary testing, like for toxicology or DNA or other testing that might be vital to determine the cause and manner of death.

For toxicology testing, typically fluids, such as blood, from one of the veins in the pelvic cavity and leg is taken, blood from the heart is taken. Liver tissue might be also obtained.

If there is urine from the bladder, that is also obtained, and sometimes the fluid in the eye is collected in case it is needed further on down the line.

Q. And did you perform these steps when doing the examination of the decedent in this case, Joshua Banka?

A. Yes.

Q. Okay. Let's first talk with the external examination. I believe you testified you were aware that there was drug abuse and drug use related to this case; correct?

[264] A. That's correct.

Q. What, if anything, do you look for on the external examination of the body that might indicate drug usage?

A. Again, the external examination is trying to detail any findings that might be pertinent, even though information may be forthcoming that may suggest that the cause of death may be related to drug use. Again, all findings are documented in case they may have contributed.

In this case one of the things that was noted was that Mr. Banka had vomit in his mouth that was still within his mouth and around his mouth.

Q. What significance, if any, something does that have, Dr. McLemore?

A. Sometimes, especially in drug use but also in other situations, there may be—a person may

aspirate or vomit while they are obtunded or while they are under the influence of drugs. Where they're sleepy, hard to arouse, their gag reflex may be suppressed. Our gag reflex is necessary to keep us from swallowing saliva, swallowing things we may vomit up.

In certain drug intoxications, that may not be there, and so vomiting and/or aspirating vomit may be a risk factor.

Q. What other sort of external signs did you examine the body for as it relates to drug use?

A. Typically I will look at areas of the body where people might inject their drugs from a needle.

[265] People who have a longer history of use of needles for taking in their drugs can do long-term damage to those vessels. If they use the same vessel over and over again to inject, the vessels get scarred. They become bulbi to the feel, and it's hard to inject needles into that vessel over time. This is what we call needle track marks.

In this case Mr. Banka did have needle tracks in the crooks of his arms, what we call the antecubital fossa, so in the crooks of his arms he had some of those scarred down vessels.

Q. Are those common injections sites for individuals that use intravenous drugs?

A. Yes, over a period of time.

Q. Okay. I'm showing you what's been marked Government's Exhibit 3-4—what's been admitted as 3-4. What does that image depict?

A. This again is the crook of one of the arms. Again, the crook is the antecubital fossa where it's

common to have your blood drawn at hospitals, but it's also common to use those vessels because they're so close to the surface and they stand out in order to inject drugs.

In the center of the crook of that arm is a linear, dark discoloration. That is exactly right there. That is actually a visible needle track mark, in addition to scarring down. If any of you have scars, sometimes when exposed to the [266] sun they become more darkly discolored.

This is a darkly discolored scar vessel.

Q. Based upon your experience would an individual showing marks like this, would that indicate long-term intravenous drug use?

A. I would be more suspicious of a longer term usage because again the scarring occurs because of repeated injections over time.

Q. Now, I'm showing you Government's Exhibit 3-5. What does that outline, Doctor?

A. Again, we have another area of a discolored linear scar that is consistent with a needle track mark.

Q. Okay. I think is there a clearer— Then we've got 3-6. What does that depict?

A. This is of the left hand of Mr. Banka, and in this area right here, there is a bruise or a contusion, a discolored bruise that has a little pinpoint area that may be a needle puncture site.

Q. You're not sure about that on Government's Exhibit 3-6; correct?

A. No. It's a bruise that would be in a location that is often used for injection of drugs, especially if the vessels in the upper arms are no longer useable.

Q. But based upon Government Exhibit 3-4, is there any doubt in your mind that that was a repeated injection site?

A. No, there's no doubt that's a needle track mark.

[267] Q. After you made these observations concerning potential places where Mr. Banka had used intravenous drugs, what did you do next?

A. Again, that was part of the external examination, and after documenting those findings, an internal examination was performed, again looking at the organs of the head, chest and abdomen.

Q. Did you find anything unusual about your internal examination of Mr. Banka's organs?

A. Yes. Mr. Banka actually had heart disease, in that his heart was very large, in fact, it was about twice the size and weight of a normal, average size man's heart.

Q. Did you notice anything concerning potentially blocked arteries or things of that nature within the chest cavity leading to his heart?

A. Yes. One of the main vessels of his heart, called the coronary artery, had moderate fatty plaque build-up of the inside of the artery, called atherosclerosis. This can cause narrowing of that vessel so that blood has a harder time passing through that area of the vessel.

Q. Do you know just in general what are some of the specific causes for this condition as it relates to drug use or a cause-and-effect relationship?

A. There are a number of reasons to have a heart as large as this. Alcohol, which is a drug, alcohol can cause the [268] enlargement of the heart because alcohol can be directly toxic to the heart.

Certain drug use, especially in the past, like stimulants like cocaine and methamphetamine, are directly toxic to the heart muscle and can cause problems.

Natural disease processes, like high blood pressure and obesity, can also contribute to enlargement of the heart.

Q. Anything else unusual or important about your internal examination of the organs that would be relevant to your examination as a medical examiner?

A. The only other findings were very nonspecific. The brain had some mild swelling. Again, that can be seen in a lot of terminal conditions and is not very specific; but otherwise there was really no other natural disease processes involving any of the other organs.

Q. And I believe that you stated that the fourth step in your procedure is to draw specimens for some ancillary testing; is that correct?

A. That's correct.

Q. And was that done in Mr. Banka's case?

A. Yes, it was.

Q. What sort of specimens were drawn from his body?

A. There was blood drawn, again from a vessel within the pelvis and leg area, a peripheral blood sample. There was also what we call a central blood sample, which was blood drawn from the [269] heart.

There was urine drawn from the bladder. There was fluid drawn from the eyes, termed vitreous, and there was also liver tissue that was taken.

Q. Once those samples are drawn, where are they sent for further analysis?

A. At the time of my term at the office there we were using a company in Indianapolis called AIT Laboratory to perform the toxicology testing.

Q. And was that standard procedure at that time at the medical examiner's office?

A. Yes, it was.

Q. Okay. Dr. Schwilke—you obviously met him this morning—is from AIT; correct?

A. That's correct.

Q. Was there a report prepared by him relating to their testing of the samples that you had sent to them?

A. Yes, there was.

Q. And did you have an opportunity to review that report in conjunction with your physical examination and making a determination of the cause of death?

A. Yes. The toxicology testing typically takes a few weeks to perform. The report was not finalized until after the—after that report was received and evaluated.

Q. Okay. Have you had an opportunity to review the results of [270] the toxicology testing?

A. Yes, I have.

Q. What are some of the things that were tested and what were they looking for during the further toxicology testing there at AIT in Indianapolis?

A. The testing that was requested was for a comprehensive drug panel. That was—that is basically testing for not only drugs, common drugs of abuse, but also testing for any other types of more commonly used prescription medications.

So in this case a comprehensive drug panel was requested since I was suspicious that the toxicology may have contributed to death, so the number of drugs that are tested for is more extensive.

Q. And would it be fair to say that a number of drugs were found in the samples that had been removed from Mr. Banka's body and sent to AIT for testing?

A. Yes.

Q. Can you run down which drugs were found in the defendant's system.

A. Values—or drugs that were detected were sorts of benzodiazepines, such as clonazepam and alprazolam. The breakdown product of marijuana was found. There were a number of opiates, such as Oxycodone, which is a prescription medication, and morphine.

Q. And when you say morphine, what breaks down into morphine in [271] the human body — what's initially put in and then breaks down into morphine?

Actually let me rephrase that. What does the presence of morphine in the defendant's body samples indicate to you as a medical examiner.

A. Morphine, again, is an opiate. It's a narcotic. Many drugs that are morphine based, drugs for even prescription medications will show up as morphine.

Heroin will break down into morphine, and it may not be possible to distinguish between morphine from heroin versus morphine from, say, morphine sulfate that you get as a prescription medication.

However, heroin will first break down into something called 6-Monoacetylmorphine, 6-MAM for short.

When 6-Monoacetylmorphine is also present in the blood, then that came—the morphine you're seeing came from heroin.

Q. Okay. And did you find that in fact in—or was that found in this case?

A. Yes, morphine—6-Monoacetylmorphine was also present.

Q. Now, let's just run down through the classes of drugs that you found. You found benzodiazepines; is that correct?

A. That's correct.

Q. And what are sort of the common drugs that—I guess common names of drugs that would contain those sort of substances or [272] classified as those substances?

A. Benzodiazepines, some of the trade names which are probably more familiar would be things like Xanax, Valium. Those are benzodiazepines.

Q. And what are those drugs commonly prescribed for in a medical setting?

A. Commonly they're used for things like anti-anxiety.

Q. Okay. You talked about there had been a breakdown of marijuana; correct?

A. Correct.

Q. And what did we see or what did the results show on that?

A. That there was an amount of the breakdown of marijuana in the blood.

Q. Okay. As we go to the heroin and the 6— You're going to have to help me with the pronunciation of that. How is that?

A. The 6-Monoacetylmorphine or you can say 6-MAM.

Q. 6-MAM, okay. I'll write that down.

That indicates that heroin was ingested prior to death; correct?

A. Ingested or snorted. You can get heroin into your body by a number of routes.

Q. So obviously at some point in time prior to Mr. Banka's death he used heroin?

A. Yes.

Q. Is there anything that is shown as a result of this testing [273] concerning levels or quantities of heroin that was found or the 6-MAM that was found in the samples submitted?

A. I'm sorry, could you rephrase that question, please?

Q. Were there levels indicated for the 6-MAM on the AIT Laboratory analysis?

A. Yes.

Q. What do those levels indicate to you?

A. The levels for the— First of all, the fact that the 6-MAM is there, to me, is more significant, again, because that helps me determine that the morphine I'm seeing was derived at least in part by heroin.

As far as the level of the morphine, the morphine was at a significantly high level, at a level higher than what the published reference range for a therapeutic dose was given.

Q. And when you say "therapeutic dose," what does that mean in laymen's terms?

A. Often laboratories will provide a therapeutic range, meaning this is the range of the medication, the level, that it sits in that you normally get if you are prescribed it and you take it as prescribed. Okay?

In this case the level was much higher than that therapeutic range.

Q. Do you know what the therapeutic range is for the morphine or 6-MAM levels?

A. I know what the reference therapeutic range is listed on the [274] report. Now, therapeutic ranges will differ depending on what's measured. But in this case the range—therapeutic range provided by the reference lab AIT is from 10 to 80 nanograms per milliliter.

Q. Okay. And what was Mr. Banka's test results in that area?

A. 201 nanograms per milliliter.

Q. Okay. So approximately 2 1/2 times higher than the top end of the therapeutic range?

A. Yes.

Q. And it also indicates the presence of codeine and oxycodone; correct?

A. That's correct.

Q. And what sort of—I guess for prescription names, what sort of prescription named drugs would have those as an active ingredient?

A. For cough suppressants, many of those drugs often will have codeine in them. Again that's not an over-the-counter medication. It's a prescription medication.

Oxycodone goes by a number of trade names, and I will have to defer to the toxicologist on all those number of trade names that go along with oxycodone.

Q. What are those drugs used to do? What's their effect on the human body?

A. Well, actually oxycodone, codeine and morphine, and you can throw in the benzodiazepines also, all of them can tend to slow [275] down the respiratory system, can slow down the mental functioning of the brain. Again, that's why the benzodiazepines are used to treat anxiety, it helps to calm it, has a calming effect on the central nervous system; but it also—they can, if taken in too much, will slow down the respiratory system. It can effectively suppress the gag reflex. The person can become obtunded, pass out, if you will, and tends to cause an overall somnolent effect on the body.

Q. You've previously indicated the morphine level was significantly higher than the therapeutic range; correct?

A. That's correct.

Q. As it relates to the benzodiazepines, the codeine and the oxycodone, how do those levels compare to the therapeutic range?

A. Well, although these levels were present, actually their levels were within the listed therapeutic range.

Q. Okay. Did you look at any other information off the AIT toxicology report to assist you in making a final determination as to the cause and manner of death in this case?

A. From the toxicology report itself?

Q. Correct.

A. Just what was listed within the toxicology report.

Q. Okay. I want to ask you a few questions leading up to your opinion on the cause of death. You testified that there was some heart disease present; correct?

A. That's correct.

[276] Q. And there was also some evidence of some blocked veins or arteries leading to the heart; correct?

A. They were narrowed, they weren't entirely blocked.

Q. Okay. Did you have an approximate percentage on how narrow they had become?

A. Again, this is another part of the autopsy is to look at certain tissues under a microscope. I could look grossly at this vessel and look to a certain degree how narrow it is. It was about half narrowed when I looked at it.

Under the microscope that fatty plaque build-up looked like it had narrowed approximately 30 percent of that opening.

Q. Based upon your examination—your internal examination of the heart and the occlusion or the blockage that you just discussed, is there at least a possibility that Mr. Banka could have died of a sudden heart attack?

A. Actually with that degree of enlargement of the heart, that can render persons susceptible to the development of a sudden cessation of heartbeats, an arrhythmia is what we call it or dysrhythmia, that can actually lead to sudden death.

Q. Did you see evidence in this case that would lead you to believe that the defendant did not have that happen and he did not die of a sudden arrythmia or stoppage of the heart?

A. In this case, especially when there may be the possibility of a drug intoxication that contributed to death, I really want to look at certain tissues under a microscope. In this case I [277] wanted to look at Mr. Banka's lungs—pieces of tissue from his lungs under a microscope to see if I can actually sort that out.

And my examination of Mr. Banka's lungs showed evidence of past usage of drugs in that there was crystalline material within certain cells of the lungs which you can see when people inject certain drugs, because there may be other things in the drugs that they get off the streets that are contaminating the drug and are not broken down as easily and they tend to get entrapped in the lung tissue.

So I did see that.

Also in areas of the lung tissue in the air spaces I saw, again, that vomitus foreign material consistent from his oral gastric area and from the mouth and throat where without that gag reflex and if he vomits,

it can go down the windpipe and into the lungs. That can happen as a terminal event for a variety of reasons.

But in this case there was also a reaction to that foreign material. Any time we're alive and we have a reaction to—we aspirate or we cut ourselves, the cells in our body will respond and travel to that area to try to fight off that foreign body, that foreign material.

And this is what was happening in Mr. Banka's lungs, he was having a vital reaction to that aspirated material.

If he had had a sudden cardiac death, even if he aspirated, he would not mount a response to it.

[278] So the fact that he is reacting to the aspiration is consistent with a longer survival time.

Q. Okay. And, Dr. McLemore, based upon your background, training and experience, in conjunction with the physical exam that you performed on the defendant, and in conjunction with the toxicology reports that you've reviewed, do you have an opinion to a reasonable degree of medical certainty as to what the cause and manner of death was in this case?

A. In this case I certified the cause of death as a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam.

Q. Would it be fair to say that the heroin was the highest level of concentration in the defendant's body at the time the samples were tested?

A. The morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range.

Q. Okay. Do you have an opinion as to whether the ingestion of the heroin by Mr. Banka was a contributing factor to his death?

A. Yes.

Q. Okay. And what is that opinion?

A. Again, because of the findings of the external exam, internal examination, the toxicology tests, in conjunction with also my microscopic examination, putting all of that together with the circumstances as they were of the death as they were known at the time, certainly is consistent with those drugs, [279] including the heroin, as contributing to death.

Q. I think other than reviewing your notes and in coming out here to testify, is that the extent of your involvement in this case?

A. Yes.

MR. COURTER: Thank you, Doctor. I don't have anything further.

THE COURT: Ladies and gentlemen, you've been sitting 45 minutes. Before I ask if there's cross-examination, if you want to stand and stretch, you may do so.

Ms. Campbell or Mr. Piper, cross-examination?

MS. CAMPBELL: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. CAMPBELL:

Q. Good morning, Doctor.

A. Good morning.

Q. When you started out your testimony, you made a distinction between causing death and contributing to death. What's the difference?

A. The cause of death is any disease or disease processes or injuries that brought about the death of a person.

A contributory is any disease, disease processes or injuries that aided in bringing about the death of a person.

Q. Okay. So when you say that something aided in it, does that mean that if they hadn't taken that drug, they wouldn't have [280] died?

A. Not necessarily.

Q. Okay. So when you say that heroin aided in Joshua Banka's death, can you tell us that had he not taken heroin, he wouldn't have died?

A. Not necessarily, no.

Q. And in fact, that's a finding in your report, isn't it, that if he died only from the heroin, you would have called it a heroin overdose?

A. Oh, yes. Certainly if he only had heroin on board, that would have been the cause of death, yes.

Q. And that's not the cause of death; right?

A. It is the cause of death as a contributor. There's no—there's not—They're not separate categories. Sometimes they can be one and the same, sometimes not.

It all is going down into what is the final cause of death, and there may be a number of contributing factors or there may not be.

Q. And in this case there were a number of contributing factors?

A. Yes.

Q. And those contributing factors included heroin; right?

A. Yes.

Q. And included OxyContin or oxycodone; right?

A. Yes.

[281] Q. And including benzodiazepine?

A. Benzodiazepines.

Q. Benzodiazepines?

A. Yes.

Q. And that contributed to the death?

A. Yes.

Q. And how about the marijuana in his system, did that contribute to his death?

A. It could possibly, again, if it contributes to the respiratory depression of the person overall.

Q. Okay. So you can't tell us which drug caused him to aspirate?

A. No.

Q. Now, I want to talk about some other findings in the—in your examination. You talked about the needle marks, and we saw those pictures. Can you tell us when the last time on an injection site a needle entered into a needle mark?

A. You mean needle track?

Q. Yeah, needle track. Sorry.

A. A needle track, again, this is more of a chronic finding, okay, that you get scar tissue over a course of time after repeated injections.

Unless there is an obvious needle puncture with bruising around it, I can't say just by looking at the track itself, the scar, when the last time that occurred.

[282] Q. Okay. Can you tell us from looking at the reports what the last drug was he used?

A. No, I cannot.

Q. Okay. Now, we talked or you talked with Mr. Courter about the amount of morphine in the system at the time you took the blood draw; right?

A. That's correct.

Q. That is not indicative of the amount of morphine in Mr. Banka's system at the time he died, is it?

A. It may not be.

Q. And is that because when you die, your body continues to process and increase the level of morphine?

A. Not necessarily. And actually this goes back to the findings in the lungs where there is a survival time, where he has time to react to the aspiration.

In that case it's actually the opposite. He may still be metabolizing the drug overdoses even though he's obtunded, so the drug level at the time that I see it in the blood at the time of death may actually be lower than the amount originally.

Q. But it could also be higher?

A. Actually—and I'm going to leave that for the forensic toxicologist about whether there can be neoformation of morphine in alcohol when a body decomposes. The alcohol—we actually can produce alcohol, and so the alcohol level may actually be higher.

[283] But morphine is a basic drug; morphine may not do that.

Q. Okay. How about the other drugs that are tested, how about the OxyContin, what happens to the levels in your body when you die, on the test? Are those accurate?

A. Again, with this, there's—from my knowledge, and again I would defer to the forensic toxicologist, but as far as neoformation after death, where the results of these drugs would be higher, I don't think that's the issue. They actually may be lower, again, because of continued metabolism while the person is still alive.

Q. So the amount of OxyContin in a system at the time you test it might be lower than when he used it and when he died?

A. That's possible, yes.

Q. Okay. Can you tell from looking at drug reports when someone used drugs or how many times they used a certain kind of drug?

A. Not really. Again, unfortunately with our testing we're only taking a sample that is out of one space in time, and that's at death, okay? So even though he may have the drug in his blood and the drug in his urine, okay, well, he was alive long enough to start metabolizing that, and it reaches the urine. It may also be that he used the drug yesterday,

and so now it's in the urine, and then he used some today, and it hasn't gotten to the urine yet, but I'm seeing both of them in [284] the urine and blood.

So there's a lot of scenarios that you can interpret these levels as far as timing.

Q. So the short answer is, you can't tell us the timing from the drug test?

A. I can't. And again, I'm going to defer to the forensic toxicologist.

Q. Okay. During your autopsy you told us you went through his entire system and did a full test.

I want to talk about his digestive system. Did he have food in his system at the time of the death?

A. Actually he had stomach contents, so he had food in his stomach.

Q. Okay. And you could tell what it was at that time?

A. And I could actually tell what it was. It wasn't very digested, and so I could actually recognize the potato with the skin still on, and what appeared to be some type of white colored meat.

Q. Okay. And correct me if I'm wrong, but I believe food remains in the stomach for about 6 to 8 hours; is that correct?

A. Oh, now we're getting into an area that is very vague. How to tell postmortem interval of death by stomach contents is not a very hard, fast science. There are too many variables to the point I can just say it can't be done. That 6- to 8-hour range, there are so many variables that speed up when food passes [285] through the stomach or slows it down, even certain natural disease processes, like diabetes,

they tend to have longer retention times in the stomach.

Drinking or eating food with alcohol tends to speed it up. Eating fatty foods tends to slow it down. A person who is under medical stress, and in this case let's say he is obtunded, the digestion system will slow down.

Q. So if he's having, let's say, heart problems throughout the day, would that slow down his digestive tract?

A. It could.

Q. And how does a heart attack develop? I mean what's the symptom?

A. Typically what will happen is a person may or may not have chest pain or sweating associated with an acute heart attack. Pain in the chest, pain down the arm, radiating down the arm can also occur.

The markers for an acute heart attack, again, are usually severe stenosis of the coronary arteries. That fatty plaque build-up, there usually is an acute change to that plaque, causing it to expand suddenly and causing then the heart to stop functioning, a heart attack, basically.

In Mr. Banka's case, he had moderate disease at most in one vessel, and under microscopic exam there was no plaque change, no acute bleeding into that plaque, no extension to that plaque to indicate to me that we were dealing with a heart [286] attack.

Q. If Mr. Banka woke up 4 hours before his death with severe pain, could you tell us from the autopsy what that was caused by?

A. Severe pain where?

Q. Severe pain in his chest and back area?

A. In his back area, no. There's no markers that I saw to account for pain in any location.

Q. Okay. Now, when you do an autopsy, you said you looked at the brain?

A. Yes.

Q. You said there was swelling in the brain?

A. Yes.

Q. What in this case would cause swelling in the brain?

A. A drug intoxication.

Q. So if he's intoxicated, his brain would swell?

A. It's kind of a terminal event, kind of like again losing the gag reflex and aspirating.

Oftentimes people who die of drug intoxications, over a time their brain will swell.

But, again, brain edema, brain swelling, is a very nonspecific finding.

Q. So it could have been caused by the heroin—the brain swelling could have been caused by the heroin use?

A. Yes.

[287] Q. Could have been caused by the oxycodone use?

A. Yes.

Q. Could have been caused by any of the drugs; right?

A. Any or all of them, yes.

Q. Okay. Now, can you tell us what would have caused Josh Banka to start vomiting?

A. Again, it's when a person is obtunded, especially if there's narcotics, that the somnolence, the depression of the respiratory effect, it will also depress certain reflexes that we all have, and one of them is a gag reflex. That gag reflex is important when we sleep routinely to not allow saliva, or if we have reflux after eating a meal and going to bed, so that that doesn't tend to go down the windpipe.

Okay. Unfortunately with high doses of narcotics—mixed narcotics, anything that suppresses that gag reflex, even alcohol, you can lose that protection.

Q. But that's the gag reflex. What causes the vomiting?

A. The vomiting can also be caused, again being obtunded, if they're prone to reflux, you have no safeguards. Your sphincters to your—between your esophagus, that tube from the mouth to the stomach, and the stomach doesn't work as well, and so you are more liable to start vomiting.

Q. Okay. So it could be that he vomited because he used drugs?

A. Yes.

Q. It could be he vomited from another reason?

[288] A. Could be.

Q. It could be that he vomited because he ate food and his gag reflex was suppressed?

A. Yes.

Q. It could be because he used oxycodone?

A. Yes.

Q. And it could be because he used any of those other prescription drugs?

A. Any or all of them, yes.

Q. Okay. Now, when someone uses oxycodone, what happens to their body?

A. Again, with oxycodone, oxycodone is an opiate, and so any opiates will tend to cause somnolence, slow down the mental capacity, slow down the thinking, slow down the breathing, the rate of breathing, and in some instances also slow down the heart rate. It slows down the body.

Q. Okay. And when someone uses heroin, is that the typical reaction in the body?

A. Yes, it is.

Q. Because aren't oxycodone and heroin both opiates?

A. Yes.

Q. And in fact using oxycodone you develop a tolerance to oxycodone; right?

A. You can develop a tolerance to all the opiates, and even nonopiate drugs, yes.

[289] Q. So if you used oxycodone off and on for several months, every few days, you would develop a tolerance not only to oxycodone but also to heroin?

A. Yes.

Q. Okay.

A. Again, and I'm going to defer that to the forensic toxicologist as far as the cross-reactivity of different kinds of opiates, so that if you use oxycodone over a long length of time, will you have the same

tolerance if you switch to another opiate like heroin, that I'm going to defer to the forensic toxicologist.

Q. You don't know how well it crosses over, but it does. You can tell us as a medical doctor that you develop a tolerance to all opiates when you use one opiate?

A. No, you don't, not necessarily, because some opiates are actually metabolized differently, so it's not as easy as, oh, it's the same class so therefore I must have tolerance with this other opiate.

It depends on how they're metabolized and other factors, which is why I'm going to defer to a forensic toxicologist.

Q. As a medical doctor, do you rely upon medical texts in your testimony and in your practice?

A. Oftentimes, yes.

Q. Are you familiar with Cecil's Medicine?

[290] A. I'm familiar with it.

Q. Okay. And is Cecil's Medicine a medical text that is relied upon by medical doctors?

A. It's one of them. There's actually quite a few medical texts that— This is an internal medicine textbook, and there's quite a few internal medicine textbooks that are used.

Q. So if Cecil's Medicine tells us that cross-tolerance is common among opiates, would you agree or disagree?

A. No, I agree.

Q. So using an opiate creates cross-tolerance for the other opiates?

A. Okay. Using an opiate may increase cross-tolerance. That passage you read said it is common. It did not say it's invariable.

Q. Okay. So it can happen?

A. But it can happen, yes.

Q. And how much, do you know, can you use at a time of heroin?

A. I'm sorry, what was that?

Q. How much heroin can you use before you overdose?

A. It depends.

Q. Okay. Can you give us a range?

A. Not really. It really depends on whether a person is a novice user, whether there's tolerance on board, whether other similar drugs are on board. It depends on a lot of different variables. It can even depend on the route that the drug is [291] taken.

Q. Okay. So you can't give us even whether .1 grams or 3 grams of heroin would cause a heroin overdose?

A. No, not really, not in an individual case.

Again, I'm going to defer to the toxicologist as far as what ranges he's seen.

Q. So you, as a medical doctor, can't tell us whether using .4 grams in Josh Banka's case would cause an overdose?

A. No, I can't.

Q. And can you tell from your autopsy and from the toxicology report whether the levels of heroin were toxic to him?

A. In that case, yes, again because in examining possible drug-related deaths, it is not just, oh, what level am I seeing or what dose did this person get, and there's your answer.

This is why a complete examination is performed with the external and the internal examination, looking for other possible causes of death.

Because you're right, people use drugs all the time and they may die from a gunshot wound to the head, okay.

This is—but this is why a complete examination is done in these cases, so all the pieces can be put together as best as possible.

Q. So if Mr. Banka didn't use the oxycodone, would he have died?

A. I don't know.

[292] Q. If Mr. Banka didn't use the marijuana, would he have died?

A. Probably not.

Q. Probably not?

A. Probably not.

Q. He probably wouldn't have died?

A. If he—sorry, if he just used the marijuana, no, he probably would not have died.

Q. Well, if we eliminate marijuana from—So if I eliminate marijuana from the equation, would he have died?

A. Actually probably so, still. The marijuana probably did not contribute as much, which is why it's not listed.

Q. Okay. How about the benzodiazepines, did they contribute?

A. Benzodiazepines?

Q. If he did not use them, would he have died?

A. Don't know. Maybe not, maybe so. Although, again, the levels were not as elevated as the morphine level.

Q. How about the Clonazepam?

A. Clonazepam, that's the benzodiazepine.

Q. So that's the same thing?

A. Uh-huh.

Q. How about did you find any evidence of Percocet in his system?

A. No, I did not.

Q. How about the heroin, if he hadn't used it, would he have died?

[293] A. Possibly not.

Q. But possibly?

A. Maybe. But with the amount of heroin in his system, the morphine that was so elevated as opposed to his other ones, it is more likely that he would not have died.

Q. But still possible?

A. Possibly, I guess. Very less likely.

MS. CAMPBELL: Nothing further, Your Honor.

THE COURT: Mr. Courter, do you have any redirect?

MR. COURTER: Just one, Your Honor.

REDIRECT EXAMINATION

BY MR. COURTER:

Q. Dr. McLemore, based upon the questions that Ms. Campbell just had for you, did anything in those cause you to change your opinion that the heroin was the contributing factor to Mr. Banka's death?

A. No.

MR. COURTER: Okay. Thank you.

THE COURT: Any recross, counsel?

MS. CAMPBELL: No, Your Honor.

THE COURT: You may be excused.

(Witness excused.)

THE COURT: Counsel, you want to call your next witness.

MR. COURTER: We call Dr. Eugene Schwilke, Your Honor.

[Logo]

Iowa Department of Public Health
Promoting and Protecting the Health of Iowans

Chester J. Culver
Governor

Thomas Newton, MPP, REHS
Director

Patty Judge
Lt. Governor

May 10, 2010

[Filed May 13, 2010]

Re: Case # 10SME181 / County Case # 10-85-0025
Joshua Banka, Subject

To Whom It May Concern:

The attached memoranda constitute our report on the above mentioned case.

If there are any questions concerning this case, please do not hesitate to contact me.

Sincerely yours,

Jerri L. McLemore, MD
Associate State Medical Examiner

Enclosure

cc: Chris Johnson, MD, Story Co. Deputy ME
Stephen Holmes, Story Co. Attorney
Tammy Noragon, NOK

JLM/jc

[Logo]

Iowa Department of Public Health
Promoting and Protecting the Health of Iowans

Chester J. Culver
Governor

Thomas Newton, MPP, REHS
Director

Patty Judge
Lt. Governor

REPORT OF AUTOPSY

CASE NO.
10SME181

DATE/TIME
April 16, 2010
9:30 a.m.

COUNTY:
Story

PLACE:
Iowa Office of the State Medical Examiner
Ankeny, Iowa

DECEDENT:
Joshua Banka

SME INVESTIGATOR:
Steve Tvrdik

PATHOLOGIC DIAGNOSES

I. Mixed drug intoxication.
   A. Needle tracks of antecubital fossae.
   B. Heroin, oxycodone, benzodiazepines, marijuana in blood.
   C. Early bronchopneumonia.

II. Cardiomegaly (680 gram).

III. Focal moderate coronary artery atherosclerosis.

IV. Blunt force injuries.
   A. Minor contusion of abdomen.
   B. Minor abrasions and contusions of extremities.

CAUSE OF DEATH: Mixed drug (heroin, oxycodone, alprazolam, clonazepam) intoxication.

MANNER OF DEATH: Accident.

AUTHORIZATION: Story County Medical Examiner.

BODY IDENTIFIED BY: Visual identification.

AUTOPSY TECHNICIANS: Jamie Coffman, Cheryl Heinzman.

PERSONS PRESENT: Adam De Camp, Division of Criminal Investigation.

EVIDENCE: Digital photographs, bloodstain card, thumb and index fingerprints, major case prints, tissue and histology, femoral and heart blood, urine, vitreous, and liver tissue for toxicology.

EVIDENCE DISPOSITION: Items listed in the above evidence section and not specifically addressed on the Evidence Disposition Form are scheduled to be destroyed six months from the date of autopsy. The Iowa Office of the State Medical Examiner must receive written request within six months of the date of this report to extend the retention time of these items.

EXTERNAL EXAMINATION

The body is received within a sealed body bag with identification attached to the zipper of the body bag.

The body is that of a well developed, obese, adult Caucasian male who weighs 240 pounds, is 71 inches in height, and appears compatible with the reported age of 32 years.

The body is received unclad. No personal effects accompany the body. The body is wrapped in a white hospital sheet.

The body is identified by an identification tag affixed to the zipper of the body bag.

The body is cool to touch. Rigor mortis is easily broken within the extremities. Fixed violaceous livor mortis extends over the posterior surfaces of the body, except in areas exposed to pressure.

The scalp hair is dark brown, straight, and measures less than 1/2 inch in length from the crown. The irides are brown. The pupils are bilaterally equal at 0.3 cm. The cornea are translucent. The sclerae and conjunctivae are unremarkable. The nose and ears are not unusual. The decedent wears a brown mustache and full beard. The teeth are natural and in poor condition. Brown vomitus is within the oral cavity and within the nares. The neck is unremarkable.

The thorax is well developed and symmetric. The abdomen is obese. The anus and back are unremarkable. The external genitalia are those of a normal adult male. The testes are bilaterally descended within the scrotum.

The upper and lower extremities are well developed and symmetric without absence of digits.

Identifying marks and scars on the body include numerous tattoos, including a medium-size monochromatic tattoo of a skull with claw on the upper right aspect of the chest, a medium-large skull with horns on the upper left aspect of the chest, a barbed wire monochromatic necklace encircling the lateral and anterior aspects of the base of the neck, a small-

medium monochromatic tattoo of a skull with curved horns on the proximal lateral upper right arm, a monochromatic medium-size tattoo of a cartoon figure from Beevis and Butthead on the mid lateral upper right arm, a large monochromatic swirl pattern tattoo on the proximal to mid lateral upper left arm, a multicolored large tattoo of a dragon with wings on the mid to distal lateral upper left arm, a monochromatic tattoo of two dragons on the mid to distal anterior left thigh, a large monochromatic tattoo of a monster-type lizard on the lateral left lower leg, a large monochromatic complex tribal pattern on the lateral right lower leg, two large monochromatic pterodactyl skeletons on the upper left and right aspects of the back, and another large monochromatic skeleton on the upper midline back. A 2 x 1 inch oval puckered scar is on the lateral left aspect of the chest near the anterior left axillary fold. A 1/2 inch horizontal linear scar is on the distal anterior upper right arm. A 3/4 inch vertical linear brown scar is on the proximal anteromedial right forearm. A 1/4 inch round scar is on the mid anterior left forearm. A 1/4 inch irregular scar is on the dorsal right hand at the base of the right ring finger.

There is no evidence of emergency medical therapy.

EVIDENCE OF INJURY

DESCRIPTION OF NEEDLE TRACK MARKS

A 1 inch oblique linear brown indurated, ropey area consistent with a needle track mark is within the anterolateral right antecubital fossa. A similar oblique linear 3/4 x 1/4 inch brown-blue indurated, ropey area is within the anteromedial left antecubital fossa, consistent with a needle track mark.

A 1/2 inch round red abrasion is on the mid posterior upper left arm. A 3/4 inch horizontal linear red scratch abrasion is on the distal anterolateral left forearm. A 1/8 inch round blue contusion is on the lateral base of the left thumb. Three curvilinear red-brown healing scratch abrasions measuring up to 2 1/2 inches are on the mid to distal anterolateral right forearm. A 1/2 inch red and blue contusion is on the lower lateral right aspect of the abdomen. Two adjacent 1 inch red-brown contusions are on the inferior aspect of the right knee. A 1 inch horizontal linear brown scratch abrasion is on the lateral left ankle. The medial aspects of the feet are chapped with peeling skin with a reddened dermis.

INTERNAL EXAMINATION

BODY CAVITIES: No adhesions or abnormal collections of fluids are in any of the body cavities. All body organs are present in normal and anatomic position.

HEAD (CENTRAL NERVOUS SYSTEM): The brain weighs 1630 grams. The dura mater and falx cerebri are intact. The cerebral hemispheres are symmetrical with mild flattening of the gyri and compression of the sulci consistent with edema. The structures at the base of the brain, including cranial nerves and blood vessels, are intact and free of abnormality. Sections through the cerebral hemispheres reveal no lesions within the cortex, subcortical white matter, or deep parenchyma of either hemisphere. The cerebral ventricles are of normal caliber. Sections through the brain stem and cerebellum are unremarkable. The spinal cord is not examined.

NECK: Examination of the soft tissues of the neck, including strap muscles and large vessels, reveals no

abnormalities. The hyoid bone and larynx are intact. The tongue is normal.

CARDIOVASCULAR SYSTEM: The heart weighs 680 grams. The pericardial surfaces are smooth, glistening, and unremarkable. The pericardial sac is free of significant fluid or adhesions. The coronary arteries arise normally and follow the usual distribution of a right dominant pattern with focal, approximately 40% atherosclerotic stenosis of the proximal segment of the left anterior descending coronary artery. The chambers and valves have alteration of the usual size/position relationship with right atrial and ventricular dilation. The circumferences of the cardiac valves are as follows: Tricuspid 14.0 cm, Pulmonic 9.0 cm, Mitral 11.0 cm, and Aortic 7.0 cm. The myocardium on serial sectioning is red-brown, firm, and does not show obvious areas of necrosis or fibrosis. The atrial and ventricular septa are intact. The thickness of the left ventricular free wall and interventricular septum is 1.4 cm and the right is 0.3 cm. The aorta and its major branches arise normally and follow the usual course with no significant atherosclerosis. The vena caves and its major tributaries return to the heart in the usual distribution and are unremarkable.

RESPIRATORY SYSTEM: The right and left lungs weigh 1000 and 970 grams, respectively. The upper and lower airways are patent, and the mucosal surfaces are pink-tan. The pleural surfaces are smooth, glistening, and unremarkable. The pulmonary parenchyma on serial sectioning is dark red-purple and exudes marked amounts of blood and frothy fluid. The pulmonary arteries are normally developed and patent.

LIVER AND BILIARY SYSTEM: The liver weighs 2600 grams. The hepatic capsule is smooth, glistening, and intact covering a red-brown parenchyma. The gallbladder contains viscid bile.

ALIMENTARY TRACT: The esophagus is lined by gray-white smooth mucosa. The gastric mucosa has focal loss of the usual rugal folds, and the lumen contains approximately 550 mL of thin, green-tan liquid with recognizable potato with skins and white meat. The small and large bowel are unremarkable. The appendix is present. The pancreas has a normal pink-tan lobulated appearance, and the ducts are clear.

GENITOURINARY TRACT: The right and left kidneys weigh 270 and 320 grams, respectively. The renal capsules are smooth, thin, semitransparent, and strip with ease from the underlying smooth, red-brown, firm cortical surfaces. The cortices are sharply delineated from the underlying medullary pyramids. The calyces, pelves, and ureters are unremarkable. The urinary bladder contains 360 mL of yellow urine; the mucosa is white-tan and smooth. The prostate is unremarkable.

RETICULOENDOTHELIAL SYSTEM: The spleen weighs 170 grams and has a smooth, intact, dark red-purple capsule covering a red-purple, moderately firm parenchyma. The regional lymph nodes appear normal.

ENDOCRINE SYSTEM: The pituitary, thyroid, and adrenal glands are unremarkable.

MUSCULOSKELETAL SYSTEM: The bony framework, supporting musculature, and soft tissues are not unusual.

OPINION

This 32-year-old Caucasian male, Joshua Banka, died of a mixed drug intoxication.

According to investigative reports, the decedent's significant other found the decedent sitting on a toilet slumped over, dead. The decedent had allegedly been using drugs throughout the night, including heroin and crushed up tablets of pain narcotics. She reportedly heard the decedent in the early morning hours sitting on the toilet snoring. Numerous drug paraphernalia were at the scene.

His past medical history was significant for misuse of numerous controlled medications and use of illicit drugs, including heroin. He had a history of anxiety. He had been taken to local emergency rooms in the past related to drug intoxications.

Autopsy findings revealed no anatomic cause of death, except for an enlarged heart with focal moderate hardening and narrowing of one of the vessels of the heart. No significant internal trauma was present; minor scrapes and bruises were on the arms and legs.

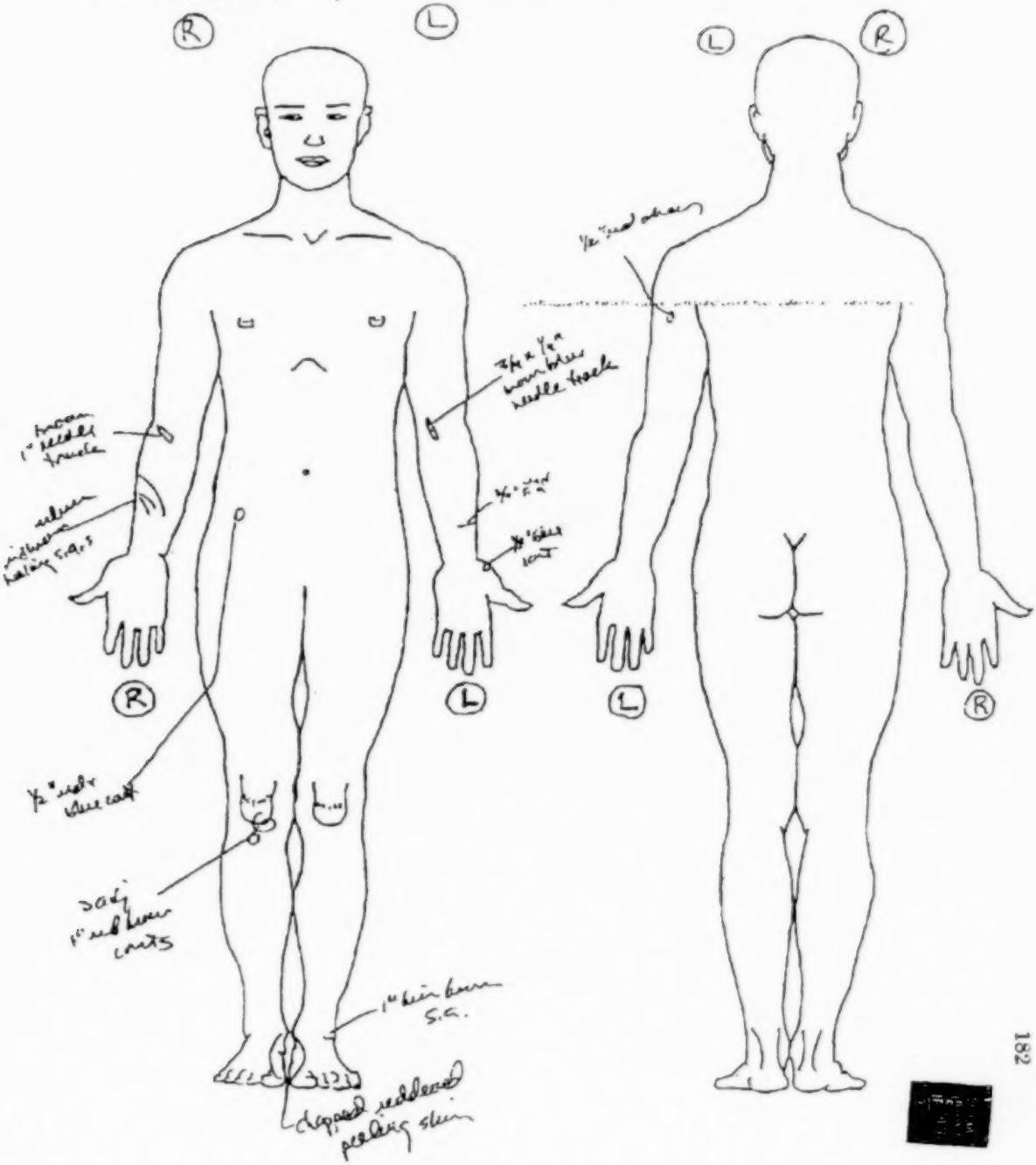
Toxicological analysis of femoral blood and urine revealed the presence of metabolites of alprazolam and clonazepam. Heroin (morphine) was elevated in blood and urine. Another opiate, oxycodone, was also present.

The manner of death is ACCIDENT.

/s/ Jerri McLemore, M.D.
Jerri McLemore, M.D.
State Medical Examiner

JM/aa

Name Banka, Joshua Case # 10SME1B1


R
L
L
R
R
L
L
R
1/2" red abrasion
1" reddish bruise
1/2" red abrasion
1" reddish bruise
1/2" red abrasion
1" reddish bruise
1" reddish bruise
1" reddish bruise

10SME181
DECEDENT: J. BANKA
DATE: 4/21/10

[/s/ initials]

PATHOLOGIST: JERRI McLEMORE, M.D.

MICROSCOPIC EXAMINATION

MYOCARDIUM- Sections show normally arranged myocytes without significant inflammation, hemorrhage or necrosis.

CORONARY ARTERY- An incomplete cross-section shows approximately 30% stenosis of the lumen by atheromatous plaque. No acute hemorrhage or plaque rupture is present in this section.

LUNGS- Sections show diffuse postmortem degradation of the tissue. Patchy anthracosis is present. Numerous clusters of brown pigment-laden macrophages are within the alveoli. There are scattered polarizable crystalline material, some of which are located within degraded macrophages. Within the more preserved areas of lung, sparse neutrophils are within the alveoli consistent with early pneumonia. Aggregates of bacterial colonies, which probably represent orogastric contents and postmortem bacterial overgrowth are present.

LIVER- Section shows scattered clusters of hepatocytes with microvesicular fatty change. Mild mononuclear inflammation is within some of the portal triads. Some of the portal triads appear slightly expanded due to fibrosis.

KIDNEY- Section shows normally formed and distributed glomeruli, tubules and vessels. Occasional globally sclerotic glomeruli are present. No significant intraluminal polarizable crystalline material is in the tubules.

SPLEEN, PANCREAS, BRAIN (HIPPOCAMPUS)-
Sections show no significant histopathology.

MICROSCOPIC SLIDE KEY
Slide A- Brain (hippocampus)
Slide B- Lungs, spleen
Slide C- Liver, kidney
Slide D- Lungs, pancreas
Slide E- Myocardium, coronary artery

Iowa Office of the State Medical Examiner
2250 S. Ankeny Blvd.
Ankeny, IA 50023-9093

EVIDENCE DISPOSITION

Date: 4/16/2010

Case Number: 10SME181

Decedent: Joshua Banka

The following listed evidentiary item/s will be held for **seven full calendar years** following the date the autopsy was performed unless the Iowa Office of the State Medical Examiner is requested to retain for a longer specific period of time either by certified mail and/or by court order:

- ☒ Histology (in paraffin)
- ☒ Microscopic slides
- ☒ Digital Photographs
- ☐ 35 mm Photographs/ Film
- ☐ 35 mm Photographic Slides
- ☐ Polaroid
- ☒ Bloodstain Card
- ☒ Thumbprints/Index Fingerprints
- ☒ Major Case Prints
- ☐ Footprints

The following listed evidentiary item/s will be destroyed after **three full calendar years** following the date the autopsy was performed unless the Iowa Office of the State Medical Examiner is requested to do otherwise either by certified mail and/or by court order:

- ☒ Tissue Sections, Forman Fixed

The following listed evidentiary item/s will be destroyed after **one full calendar year** following the date the autopsy was performed unless the Iowa Office of the State Medical Examiner is requested to do otherwise either by certified mail and/or by order:

☒ Femoral Blood	☒ Vitreous	☐ Kidney
☒ Heart Blood	☐ Brain	☐ Bile
☒ Urine	☒ Liver	☐ Skeletal Muscle
☐		

Signed,

/s/ Jerri L. McLemore, MD
Jerri L. McLemore, MD
Associate State Medical Examiner

[180] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCUS ANDREW BURRAGE,
Defendant.

TRIAL TRANSCRIPT
Volume II

EXCERPT OF TESTIMONY OF
DR. SCHWILKE

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Tuesday, June 28, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[294] THE COURT: If you would place yourself in the witness box, please, Sir, and then after doing so, if you would stand and look at the ladies and gentlemen of the jury, raise your right hand to be sworn, please.

EUGENE Q. SCHWILKE,
GOVERNMENT'S WITNESS, SWORN

THE COURT: Please be seated. Doctor, pull the microphone close to you so the jurors and the lawyers can hear you.

Mr. Courter, you may proceed.

DIRECT EXAMINATION

BY MR. COURTER:

Q. Would you state your full name and spell your last name.

A. Eugene Q. Schwilke, S-c-h-w-i-l-k-e.

Q. Are you a forensic toxicologist, Sir?

A. Yes.

MR. COURTER: May I approach, Your Honor?

THE COURT: You may.

Q. I just handed you what's been marked Government Exhibit 4-2 for identification. Do you recognize what that document is?

A. Yes.

Q. What is 4-2?

A. This is a copy of my curriculum vitae.

Q. Does that outline in detail your professional training and experience?

A. Yes.

[295] MR. COURTER: Move to admit 4-2, Your Honor.

MS. CAMPBELL: No objection.

THE COURT: Received.

(Government's Exhibit No. 4-2 was offered and received into evidence.)

Q. That's obviously very lengthy, but why don't you give us the highlights of your background, training and experience that qualifies you to being a forensic toxicologist.

A. Yes. I received my Bachelor of Science degree from the University of Washington in 1995, in wildlife science, and I was also employed at the Washington State Toxicology Laboratory for several years during my undergraduate work.

At that time while I was at the state toxicology laboratory in Seattle, I received board certification from the American Board of Forensic Toxicology as a forensic toxicology specialist; and in 2003 I left that laboratory to pursue my doctorate in forensic toxicology from the University of Maryland, and completed that in 2010, with a degree in toxicology and emphasis in forensic toxicology; and I've also published several papers, scientific and peer-reviewed articles.

Q. Where are you currently employed?

A. AIT Laboratories in Indianapolis.

Q. How long have you been with AIT Laboratories?

A. Almost 3 years now.

Q. Okay. What are your specific duties as a forensic [296] toxicologist? What exactly do you do?

A. Well, for AIT I serve as an internal and external consultant or expert in toxicology to interpret analytical findings for law enforcement, physicians, coroners and medical examiners offices. I also provide internal and external training in forensic toxicology or drug interpretations.

Q. Okay. Now, Dr. McLemore just testified prior to you being in the courtroom; correct?

A. Yes.

Q. And you've had an opportunity to talk with her this morning; is that correct?

A. Yes.

Q. Did AIT Laboratories perform certain tests on some bodily fluids that the Iowa Medical Examiner's office had sent to AIT Laboratory?

A. Yes.

MR. COURTER: May I approach, Your Honor?

THE COURT: You may.

BY MR. COURTER:

Q. I've handed you what's been marked Government Exhibit 4-1 for identification. Do you recognize what that document is?

A. Yes. This is a copy of the AIT Laboratory toxicology report that's produced at the completion of the analysis conducted on a series of biological specimens.

MR. COURTER: We'd move to admit 4-1, Your Honor.

[297] MS. CAMPBELL: No objection.

THE COURT: Received.

(Government's Exhibit 4-1 was offered and received into evidence.)

MR. COURTER: Move to publish.

THE COURT: You may.

Q. Dr. Schwilke, why don't you just give us a rundown on what the first page there at the top,

what that shows. What's that initially show at the top of the first page of the report?

A. At the top of the report we provide the demographic information of the subject as well as the information retrieved or collected from our client. In this case it would be the Iowa office of the State Medical Examiner, as our client. And the subject's information is also provided, including their name, the agency's case numbers, including the date of death.

Sometimes, if indicated, the test reason will be included. The investigator sometimes is included as well, also the date received and the date reported. The date the specimens were received in the laboratory, and then when the final report was submitted to the client.

Below that is a section on the specimen that were collected in the subject, and the information provided here is what type of specimen. In this case it says femoral blood was collected. It also—you can see the laboratory specimen number. Each specimen is assigned a specific number as it is tested in [298] the laboratory; the date that the specimen was collected, and then finally the tests that were requested by the agency that submitted the samples. In this case they requested the comprehensive drug panel.

Q. As we look here at the top, the samples indicate that it came from Joshua Banka; correct?

A. That's right.

Q. You're aware of the fact that Dr. McLemore has reached the opinion that Mr. Banka died of a mixed drug overdose; correct?

A. Correct.

Q. Are you also aware of the fact that in her opinion that the heroin Mr. Banka had ingested was a contributing factor to Mr. Banka's death?

A. That's correct, yes.

Q. Based upon the tests that you have run, do the toxicology tests support her medical opinion on that issue?

A. Yes, they do.

Q. Can you describe to me or tell the jury why your tests support her medical opinion.

A. Well, there were multiple drugs detected in this case, and one of which were the metabolites of heroin. The morphine and 6-Monoacetylmorphine are both heroin metabolites. Codeine is present as well, but that is present as an impurity in the heroin most likely, but it's not a metabolite. Regardless all three of those drugs are found in the blood as a result of [299] heroin use.

And then concentrations detected of all of these medications—or, excuse me, of these drugs, are consistent with death in a number of contexts.

Q. Can you expand on that, "consistent with death in a number of contexts"?

A. Yes. There's quite a range of concentrations that one might expect to see in the blood of a decedent for morphine and for the other metabolites, 6-Monoacetylmorphine, and these concentrations are within that range that would be expected.

Q. Now, the first page of this, page 1 of 4, shows the blood that was drawn from the femoral artery; is that correct?

A. That's correct.

Q. And what are we showing positive drug hits for? Which drugs do we have there?

A. There were a number of drugs that were detected, including the metabolite of Clonazepam or Klonopin, and that drug is 7-Amino Clonazepam. Also Xanax or Alprazolam was detected. Marijuana constituents also were found. The active drug in the marijuana plants, THC, was detected as well as its metabolite or its break-down product in the body, and that's what a metabolite is.

That metabolite is THC-COOH, or carboxylic THC is another word for it.

Morphine, again, is a metabolite of heroin. [300] 6-Monoacetylmorphine is a metabolite of heroin, and codeine is likely an impurity in the heroin.

Oxycodone is available in a number of different formulations. The most typical or most common would be OxyContin or Percocet; but there are several different other versions of this drug produced by different pharmaceutical companies, so it's available quite widely and in different formulations.

And with respect to the blood that completes the list.

Q. All of the drugs that were listed for positive presence in Mr. Banka's samples that were submitted, do they share common effects on the human body?

A. Yes, they do.

Q. And what are those common effects?

A. Well, every drug on this list, with the exception of the constituents of marijuana, have central nervous system depressant affects. They tend to slow

the nervous processes, and in particular with respect to a toxicity or toxic reaction, the slowed breathing process or respiratory depression is a common finding or it's a common toxic effect when multiple central nervous system depressant medications are combined together.

Q. Now, as we get over to the right side of your report, we have a concentration level, the units of concentration, and then the therapeutic range; is that correct?

[301] A. That's correct.

Q. It appears that the heroin derivative was the only one that was excessive and above the therapeutic range; is that correct?

A. Yes. If you're referring to morphine, yes.

Q. Excuse me, the morphine.

What significance does that have, based upon your training and experience as a forensic toxicologist?

A. The therapeutic ranges?

Q. Well, the therapeutic ranges and then the range or the actual amount that was found in the sample you tested.

A. Well, the therapeutic ranges, first of all, are derived from healthy subjects in clinical studies taking low to moderate doses of a medication, and so oftentimes this is the only available literature that we have to rely on in establishing what the therapeutic range is for a given drug.

So in the context of a death, for example, where drugs were taken in excess, then therapeutic ranges might apply, but they may not because certain medications, such as morphine, for example, is subject to

tolerance, and a person can take a medication for a long period of time and eventually increase their dose to the point where a higher concentration then would be expected in a clinical study, for example, is easily sustainable by that person just because they have developed enough tolerance to the medication and they can withstand a fairly high concentration of the drug in their blood, so the [302] therapeutic ranges themselves are—I don't want to say that they're useless, but they're only useful to a certain degree, and we have to consider the context of each individual case and as well as the therapeutic range in establishing whether or not toxicity from a given medication occurred.

And in a case like this, where there are multiple medications detected, the combined drug effects or synergistic drug effects, meaning 1 plus 1 equals 3, when you combine all the effects together, there's a synergistic or overenhanced effect of the medication when multiple CNS depressant or central nervous system depressant drugs are taken at the same time.

And so the therapeutic ranges again are useful, but they're not necessarily the only means and should not be used as the only means of establishing toxicity.

Q. Let's just assume for argument sake, Dr. Schwilke, that Mr. Banka in this case has a past history of heroin use, and that prior to April 14 or April 15 of 2010, his last heroin use would have been in October of 2009. Does that have any impact on the tolerance levels that you just talked about and the toxicity of the level of drugs found in his system?

A. Yes. In fact, if that were the case, I would expect that a single heroin administration that resulted in a concentration of 201 nanogram per mil-

liliter, for example, if that were taken under those circumstances, that it would be expected to be highly toxic. That represents a dose that would exceed what [303] would be tolerable for a nontolerant individual, and even though a history of heroin use is in place for this individual, they would be considered nontolerant based on the fact that tolerance dissipates rather quickly and certainly within the time frame that was just mentioned.

Q. You said if all those factors were in fact present it would exceed a tolerable level; is that correct? Did I hear that correctly?

A. That's right.

Q. What does that mean in laymen's terms, "to exceed a tolerable level"?

A. Well, the body has the ability to become resilient to medications as they are being taken even acutely. For example, a single dose of a medication is tolerable to a certain degree; and then after a certain point, the body is unable to handle the toxicity associated with the drug in the body because there's essentially just too much in the body. Then toxic effects begin to occur.

Q. What are toxic effects that you might expect to see in a case like this?

A. In particular I'm referring to respiratory and/or central nervous system depression.

Q. And what happens when the central nervous system and/or respiratory systems become too depressed?

A. The person essentially stops breathing.

[304] Q. And then dies?

A. And dies.

Q. Page 2 of your toxicology report shows a number of different drugs that were tested for as part of the screen; correct?

A. That's correct.

Q. And were all those negative for those?

A. That's correct.

Q. Page 3 of your toxicology report shows the testing of the urine; correct?

A. That's correct.

Q. What is significant on page 3 with the urine test as it relates to the ingestion of the drugs by the decedent, Mr. Banka?

A. The urine in this case is a means of verifying—not confirming but verifying the presence of the drugs in the blood, and it further corroborates that these drugs were in fact ingested or the person was exposed to them.

The urine itself is not a good specimen for determining toxicity from. It is only a means of indicating drug use within the past several days.

And so if we were limited to only a urine specimen, we could make very few statements about toxicity or the timing of ingestion, other than to say the drugs were in fact used within the last few days.

So looking at this urine specimen in combination with the blood, we can verify that, in fact, Xanax was detected, [305] verifying ingestion of Xanax which is the Alprazolam, and the a-OH-Alprazolam, also called alphahydroxy Alprazolam. It's the metabolite of Alprazolam.

Again, 7-Amino clonazepam is the metabolite of Klonopin, and that is also detected.

The metabolite of marijuana also was found. Morphine, 6-Monoacetylmorphine, codeine, oxycodone. In fact, everything that we find in the blood is present, and then there's one additional drug here in the opiates category called oxymorphone, and that's a metabolite of oxycodone, again verifying the exposure to oxycodone.

Q. And that last one didn't show up in the blood sample; is that correct?

A. Oxymorphone did not, and it's not expected to.

Q. Why is that?

A. Just the simple disposition of the drug in the body. The metabolite is formed and is present in the blood at very low concentrations. It is excreted in the urine where we do end up finding it eventually, but it's oftentimes not detectible in the blood.

Q. Okay. The levels in concentrations shown in this for the urine test I believe with the heroin here in excess of 10,000, does that have any significance to you as a forensic toxicologist in a case like this?

A. Only in that urine concentrations represent drug [306] accumulation. In other words, the body is trying to get rid of the drug, it's excreting it by any means possible, and generally speaking that occurs through the urine, and the urine is a static vessel. It's a location where the drugs can be emptied into before they're excreted completely from the body.

And what the kidney does is it concentrates urinary constituents, meaning the concentration of whatever is found in the urine will increase well

beyond what would be expected in the blood as it filters the blood.

Okay. And you end up with much higher concentrations in the urine than you would ever expect to see in the blood, and that's really all we're seeing here is an accumulation of blood in the urine representing recent drug use.

Q. And the last page of the report deals with serum; correct?

A. That's correct.

Q. And there's no testing performed on any serum?

A. That's correct.

Q. Dr. Schwilke, based upon your knowledge of this case, your background, training and experience, and in conjunction with the testing that had been performed at your laboratory, do you have an opinion as to whether the ingestion of heroin was a contributing factor in the death of Joshua Banka?

A. Yes.

Q. And what is that opinion?

A. My opinion is that it was a contributing factor.

[307] MR. COURTER: Thank you, Sir. I don't have anything further.

THE COURT: Is there any cross-examination?

MS. CAMPBELL: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. CAMPBELL:

Q. Sir, I'd like to start with other things you can determine from this test and from your testing of Mr. Banka. I'm going to start with the marijuana.

Can you tell from this test when the last time was he smoked marijuana before his death?

A. It can be estimated, and a time range can be given from these data.

Q. And what is that time range?

A. I would have to do the calculation to provide actual numbers; but looking at these results, I would expect that it's likely very recent.

Q. So what do you mean by "very recent"?

A. Very recent to the timing of death, meaning the presence of THC in fact is an indication that the drug would have been—exposure would have occurred within the last several hours prior to death.

Q. Okay. If he had smoked marijuana at 9 a.m. the prior morning, so 20 hours before, would that cause this or would he have had to have smoked again?

[308] A. It's possible. In a living individual, the calculation would probably determine that 20 hours is outside the expected range, but without doing the calculation I couldn't be sure.

Q. But your initial thought is that it's outside the expected range?

A. Yes, indicating that it would be a likely shorter time frame than 20 hours.

Q. Okay. And that's because marijuana is absorbed pretty quickly into the blood, isn't it, THC is, when it's smoked?

A. It's distributed into the tissues very rapidly after smoking, yes.

Q. And then I want to take a look then at this is a number we were talking about, right, the morphine, 201 nanograms per milliliter?

A. Yes.

Q. And can you tell us, does that mean that it was used recently, that quantity, or in the past?

A. The recency of use can't really be determined by the number alone. There would need to be several assumptions before an estimate of timing of use could be made.

Q. Okay. How long will you test positive on this blood test after you use morphine or after you use heroin?

A. That depends on a number of factors, and including the dose itself, the individual's physiology, the ability to process the drug in the body and excrete it, and without having specific [309] information that I can work from, I couldn't really give an estimate. I would have to make assumptions by the dose in particular as well as again these physiological parameters before I could make a judgment on that.

Q. Well, you told us that this number was significant to you because in a nontolerable user it would be toxic?

A. Yes. What I mean by that is that the concentration itself is in the range that would be expected to produce toxicity, and it is associated with

a higher dose. For example, if we assume all else is equal in the calculation, 201 nanograms per milliliter would represent a higher dose than, say, 50 nanogram per milliliter, again assuming all else is equal.

But those assumptions are often violated, and we can't be sure of whether or not those assumptions are truly accurate.

Q. Because 201, you're comparing it to this 10 to 80 range. The 10 to 80 therapeutic range is for someone who doesn't use it; right?

A. 10 to 80 in this case is associated with morphine alone. It is associated with the therapeutic effects of morphine administered as morphine.

In this case morphine is present as a metabolite of heroin, and the toxicity associated with heroin is very different than the toxicity associated with morphine; and so we can't compare apples and oranges with that respect.

And what I mean by the 201 nanogram per milliliter [310] concentration being associated with toxicity, that is based on what's published in the literature from decedents who have been exposed to heroin.

Q. Okay. So we can essentially ignore this 10 to 80 because it does not apply to heroin; right?

A. For that particular drug, yes, I would say it does not matter that much.

Q. Now, you could—someone who uses heroin regularly could have a level of 201 without it being toxic?

A. In theory, yes.

Q. And when you testified earlier, you were told that Mr. Banka hadn't used heroin since October of

2009. Did that fact affect your opinion as to whether or not 201 would have been toxic to him?

A. Yes. I'm assuming in the way the question was posed to me is that I'm assuming this person is essentially nontolerant, they have not used heroin nearly often enough to develop the level of tolerance that would be necessary. And if that in fact were changed, or if I was asked to assume something completely different, then that may change my answer.

Q. Well, let's change it then. What if he uses heroin frequently, would 201 be toxic?

A. It's possible it still could be.

Q. But it might not be?

A. It might not be.

[311] Q. And now if someone uses oxycodone regularly, does that affect your opinion as to whether or not they would be tolerant to the use of heroin?

A. There is some cross-tolerance associated with different opiates, yes.

Q. So if Mr. Banka used oxycodone throughout this entire period of time, for months at a time, without stopping, would that affect your opinion as to whether or not 201 would have been toxic?

A. I still think that 201 representing heroin metabolism to morphine is considered excessive. And the reason for that is the concentration of oxycodone in this sense is only 30.4 nanogram per milliliter. In the scenario you just posed, we would expect to see a higher concentration of oxycodone representing tolerance, meaning able to withstand much higher blood concentrations of oxycodone, and in fact that's not what we're seeing here.

Q. How long does your oxycodone stay in your system here? I mean what is this 30.4 representing? How frequently could he have used that oxycodone?

A. It depends on the dose. It depends on a number of factors. But it's associated with a single 5 to 10 milligram dose, and that's very typical of a person who's just starting out on oxycodone pain therapy, for example. So this concentration is consistent with a relatively low dose.

[312] But that doesn't mean necessarily that they have not been using oxycodone in their past—their recent past for several weeks prior, but this most recent dose is certainly consistent with a relatively low administration such as 10 milligrams, for example.

Q. Now, you told us that on this other report you couldn't always detect oxycodone; right?

A. Oxymorphone.

Q. Oxymorphone?

A. Yes. Oxymorphone is detected in the urine, and that's a metabolite of oxycodone, and it's generally speaking not present in the blood because of the concentration being so low.

Q. So even though you can't use your femoral blood test to tell us whether or not this guy uses a lot of oxycodone, you can use the test from the urine to tell us that he has over 5,000 nanograms of milliliter of oxycodone in his system; right?

A. Yes. The concentration in the urine is again much higher than would be expected in the blood due to accumulation.

Q. So that means that he uses oxycodone a lot?

A. Not necessarily.

Q. He's used it in the past?

A. He's used it in the recent past, that much we can say. But the extent of oxycodone use cannot necessarily be established by even a urine specimen. In this case it's possible that this represents only a single 10 milligram administration.

[313] It's also possible that multiple administrations have occurred over the last couple of days and resulted in this urine concentration. Both are possible.

Q. So you can't really tell us?

A. I can't tell.

Q. But also from this urine test you can tell us that he has quite an accumulation of the metabolite of heroin; right?

A. Morphine.

Q. Isn't morphine a metabolite of heroin?

A. Yes. There are two metabolites of heroin, the 6-Monoacetylmorphine and morphine itself.

Q. Okay. What's the difference between being at this level the 10,000 versus the 6-Monoacetylmorphine level?

A. The 6-Monoacetylmorphine is the intermediary metabolite between heroin and morphine itself, so heroin is present in whatever form it's present in the drug itself before it's ingested. When it gets into the body, the body converts it or metabolizes it first to 6-Monoacetylmorphine and then extremely rapidly converts it further to morphine.

So the presence of 6-Monoacetylmorphine, for example, in this case would represent first heroin use, okay, is the only reason that the drug would be present in the blood and in the urine is as a result of heroin; and we could also say that this represents relatively recent heroin use, meaning the last several hours.

[314] The drug disappears from the body rather quickly, and so if you detect it at all in any specimen, whether it's blood or urine, then a certain general time frame of drug exposure can be established for the heroin.

And the concentration of morphine—Let me back up. Does that answer your question?

Q. Yes.

A. Okay.

Q. Well, so this 427 number indicates recent heroin use?

A. Relatively recent.

Q. Relatively recent. What do you mean by "relatively recent"? What's the range until the Mono 6 turns into morphine?

A. Well, the rate of disappearance of 6-Monoacetylmorphine from the blood occurs with a half-life of only up to 25 minutes. So that means—That's a very short period of time on the scale of half-lives. And that means that the drug will disappear so quickly that within the course of an hour it may be completely undetectable. It may take a couple of hours, maybe a few hours in some people, depending on again their physiologic variables that they individually have.

So given that, you know, it's very likely that heroin exposure would have occurred within the last several hours of the death, and the urine again just corroborates the heroin exposure.

6-Monoacetylmorphine at 427 nanogram per milliliter in [315] the urine again represents heroin exposure; but the duration that this metabolite 6-MAM, or 6-Monoacetylmorphine, will be detectable in the urine is a little bit longer than in the blood, again due to the accumulation and the fact that the urine is a static vessel. Once the blood is filtered and the drug ends up in the urine, it stays there for a while until the person voids, and so it's oftentimes detectible in the urine for a little bit longer.

So within those confines, really all we can say is that heroin exposure must have occurred within the last several hours. Pinpointing an exact time frame is very difficult.

Q. Okay. But this 10,000, does that indicate that he had used heroin before?

A. No.

Q. How do we tell whether or not he's used heroin before?

A. You cannot base—or you cannot answer that question based solely on the toxicology results.

Q. Okay. So we can't tell when he used heroin last, right, or how frequently he had been using heroin?

A. Well, pinpointing an exact hour or time, you know, I cannot do that. I cannot estimate an exact time from the death that heroin exposure would have occurred.

But what I can say is that merely due to the presence of the 6-Monoacetylmorphine we can narrow it down to the last several hours as opposed to last few days.

[316] Q. Okay. Now, can you do the same thing for the oxycodone, this 5511—the oxymorphone? I'm sorry.

A. Well, again, that's a metabolite of oxycodone, and this is a typical concentration that might be expected in someone who uses oxycodone, even one who uses it daily. But I would say that based on the blood concentration, that it's not an excessive dose. It's not an extremely high dose that they are taking, if they are taking it daily.

Q. I mean can you tell just in general what do these numbers represent, how long are they good for? I mean if he had used a week ago, would these show up as anything?

A. The Xanax and maybe the clonazepam may still be detectible after a week. The cannabinoids or carboxylic THC easily could be after a week. The rest of these drugs, likely not.

Q. Okay. Now, Doctor, if Mr. Banka had not taken the heroin, can you tell us whether he would have died?

A. I cannot.

Q. If he had not taken the oxycodone, can you tell us whether he would have died?

A. I cannot.

MS. CAMPBELL: Nothing further, Your Honor.

THE COURT: Mr. Courter, any redirect?

MR. COURTER: No, Your Honor.

THE COURT: You may step down. Thank you.

(Witness excused.)

* * * * *

AIT Laboratories
A Higher Standard of Service®

2265 Executive Drive, Indianapolis, IN 46241
Telephone: (317) 243-3894 / Fax: (317) 243-2789

Laboratory Specimen No: 40169605					Continued.
Analyte: Name	Result	Concentration	Units	Therapeutic Range	Loc
Acetone	Negative				
Isopropanol	Negative				
ANALGESICS	Negative				
ANESTHETICS	Negative				
ANTIBIOTICS	Negative				
ANTICONVULSANTS	Negative				
ANTIDEPRESSANTS	Negative				
ANTIHISTAMINES	Negative				
ANTIPSYCHOTICS	Negative				
CARDARDIOVASCULAR AGENTS	Negative				
ENDOCRINE AGENTS	Negative				
GASTROENTEROLOGY AGENTS	Negative				
NARCOTICS	Negative				
NEUROLOGY AGENTS	Negative				
SEDATIVES/HYPNOTICS	Negative				
STIMULANTS	Negative				
UROLOGY AGENTS	Negative				

Specimens will be kept for one year from the date received.

BANKA, JOSHUA
Laboratory Case #: 1254988
Print Date/Time: 05/05/2010. 17:48:46

AIT Laboratories
A Higher Standard of Service®

2265 Executive Drive, Indianapolis, IN 46241
Telephone: (317) 243-3894 / Fax: (317) 243-2789

Laboratory Specimen No: 40169606		Date Collected: 04/16/2010			
Container(s): 01:UR Urine, Random		Test(s): 70080		Drugs of Abuse Panel	
Analyte: Name	Result	Concentration	Units	Therapeutic Range	Loc
AMPHETAMINES	Negative				
BARBITURATES	Negative				
BENZODIAZEPINES	POSITIVE				
Alprazolam	POSITIVE				
Alprazolam, Quant		371	ng/mL		
a-OH-Alprazolam	POSITIVE				
a-OH-Alprazolam, Quant		700	ng/mL		
7-Aminoclonazepam	POSITIVE				
7-Aminoclonazepam, Quant		188	ng/mL		
CANNABINOIDS	POSITIVE				
Carboxy THC	POSITIVE				
Carboxy THC, Quant		70	ng/mL		
COCAINE/METABOLITES	Negative				
METHADONE/METABOLITE	Negative				
OPIATES	POSITIVE				
Morphine	POSITIVE				
Morphine, Quant		>10000	ng/mL		
6-Monoacetylmorphine	POSITIVE				
6-Monoacetylmorphine, Quant		427	ng/mL		
Codeine	POSITIVE				
Codeine, Quant		484	ng/mL		
Oxycodone	POSITIVE				
Oxycodone, Quant		>5000	ng/mL		
Oxymorphone	POSITIVE				
Oxymorphone, Quant		5511	ng/mL		
PHENCYCLIDINE	Negative				
ALCOHOLS	Negative				

BANKA, JOSHUA
Laboratory Case #: 1254988
Print Date/Time: 05/05/2010. 17:48:46

AIT Laboratories
A Higher Standard of Service®

2265 Executive Drive, Indianapolis, IN 46241
Telephone: (317) 243-3894 / Fax: (317) 243-2789

Laboratory Specimen No: 40169807			Date Collected: 04/16/2010		
Container(s): 01:T Serum		Test(s): 49900	Not Tested		
Analyte: Name	**Result**	**Concentration**	**Units**	**Therapeutic Range**	**Loc**
< No Testing Performed >					

The Specimen identified by the Laboratory Specimen Number has been handled and analyzed in accordance with all applicable requirements.

BANKA, JOSHUA
Laboratory Case #: 1254988
Print Date/Time: 05/05/2010. 17:48:46

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume II

EXCERPT RE: MOTION FOR JUDGMENT OF ACQUITTAL

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Tuesday, June 28, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[342] The record should show that Ms. Hicks transcript reveals "A Juror: Excuse me, Your Honor, I'm kind of getting sick to my stomach. May I be excused?"

And then what I said is on the record, so I didn't give the government a chance, because of the sudden statement of the juror, for the government to rest.

Mr. Courter, I'm assuming, based on our conversation when we recessed this morning, that you're ready to rest?

MR. COURTER: We do rest at this time.

THE COURT: All right. I'll let you do that in front of the jury.

And then, Ms. Campbell, I thought the most appropriate thing to do was, you didn't know if you were going to have evidence, and we also have the matter of the opening statement, so I thought—and we also have the additional Rule 29 record that you'll undoubtedly want to make, so do you have evidence?

MS. CAMPBELL: Yes, Your Honor.

THE COURT: All right. I'll let you make your record now even though as a formal matter Mr. Courter hasn't rested. I'll let him rest in front of the jury, but I'll consider your Rule 29 motion made at the conclusion of the government's case if you want to do that now.

MS. CAMPBELL: Yes, Your Honor.

THE COURT: All right.

MS. CAMPBELL: I'd start with Count 1. Count 1 is the [343] distribution of heroin to Breanne Brown. What we have in evidence is Breanne Brown saying that she purchased heroin from Marcus Burrage.

We have a law enforcement officer testifying that from half a block away he could identify the defendant, even though he put in his report that it was a black male that he witnessed.

I do not think that is sufficient, Your Honor, under the law to convict him of distribution of heroin, given the fact that Ms. Brown then later testified that she was untruthful with law enforcement and that she had—actually Mr. Burrage had actually been staying in her house and living with her, and that there was no other corroborating evidence putting Mr. Burrage at the scene or with Ms. Brown at that time.

So we would make a motion for judgment of acquittal under Rule 29 as to count 1.

As to count 2, Your Honor, we have Ms. Noragon as the only witness that puts Mr. Burrage distributing heroin to Mr. Banka. There's been testimony that that's the first time he used heroin in several months. Her testimony is that she wasn't using at that time, only he was, and that it was just the last time ever, and that he hadn't used for months.

Your Honor, that's just not believable under the circumstances. He didn't just spontaneously quit using heroin, move to Iowa and stopped using it.

He wouldn't have had that need to use it so much that [344] he would use it immediately in the car upon purchasing it. So I think the element of distributing heroin hasn't been met by the government, and we would make a motion based on that element that there isn't sufficient evidence to convict Mr. Burrage of distributing heroin to Mr. Banka.

We also have the issue of whether or not that heroin caused the death of Mr. Banka. And this will go to a circuit split as to whether or not it would need to be a sole cause, whether or not there could be an intervening cause, whether or not we could use mixed drug intoxication to convict Mr. Burrage when there's

been no evidence that he distributed the other drugs to Mr. Banka.

Both medical witnesses have testified that they can't say that Mr. Banka wouldn't have died but for the heroin. And if you use a "but for" causation test, which we request that you use, Your Honor, that there is no evidence that but for that heroin, Mr. Banka would not have died.

He could have died from the use of the other controlled substances. He had a heart twice the size of a normal heart. There are other causes that were contributing to his death, and heroin was not the sole cause of his death.

So for that reason, Your Honor, we would request a finding under Rule 29 that there has not been sufficient evidence that Mr. Banka died as a sole result of using the heroin the government alleges Mr. Burrage provided him. Thank [345] you.

THE COURT: Mr. Courter.

MR. COURTER: You want the standard denial to that, or would you like the preview of the government's closing argument?

THE COURT: This is your case, Counsel.

MR. COURTER: Your Honor, in view of the evidence in the light most favorable to the government, the government has presented sufficient evidence to establish the prima facia case of each and every element alleged in counts 1 and 2 of the indictment.

Specifically on count 1 there was an eyewitness identification from two witnesses that the defendant was the individual who sold the heroin on that occasion. That transaction is also recorded on audiotape.

As it relates to count 2, there's an eyewitness in-court identification from Ms. Noragon. There is a photo lineup identification from Ms. Noragon. There is text message conversations between the defendant and the decedent's cell phone leading up to the transaction, all of those factors support count 2, at least the distribution aspect of it.

As it relates to the causing death aspect of count 2, the medical testimony from Dr. McLemore and the forensic toxicologist testimony from Dr. Schwilke clearly establish that the ingestion of the heroin was a contributing factor to Mr. Banka's death.

[346] So based upon all those grounds, Your Honor, we would ask the Court to deny the motions for verdict for judgment of acquittal.

THE COURT: All right. The government's case, taken in a light most favorable to the government, the nonmoving party, has created jury questions as to both counts of the indictment. The defendant's motion under Rule 29 is overruled.

Ms. Campbell, how much evidence do you have?

MS. CAMPBELL: Two witnesses, Your Honor.

THE COURT: Okay. And is one of those the defendant?

MS. CAMPBELL: Yes, Your Honor.

THE COURT: All right. And do you want to—Well, I'll have Mr. Courter rest, and then we'll go directly to your evidence.

MS. CAMPBELL: I have a brief opening.

THE COURT: Yeah, I'll let you make your opening, and then I'll let you present your evidence.

MS. CAMPBELL: Thank you, Your Honor.

THE COURT: Okay. With the juror's sudden illness, we don't know, she's not an alternate, so with that we better take a recess so we can check and see how the juror is doing. We'll reconvene at 25 minutes after 2.

(Short recess.)

(In open court, out of the presence of the jury.)

THE COURT: The record should show that Court is

* * * * *

[180] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume II

EXCERPT RE: MOTION FOR JUDGMENT
OF ACQUITTAL AND JURY INSTRUCTIONS

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Tuesday, June 28, 2011
8:30 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge.

* * * * *

[390] be any delay.

Additionally, even at this late stage of the case it's important for you to remember the conduct of the jury instruction because both parties, the United

States and Mr. Burrage, have much at stake here. This is very important. All of the lawyers have worked hard on the case so they're depending on you to keep following the instructions. I can tell just by observing you how hard you have worked and will continue to work on this case so I certainly appreciate your hard work.

With that, we're in recess with the jury until 9 o'clock tomorrow morning.

(In open court, out of the presence of the jury.)

THE COURT: Please be seated.

The record should show we're out of the presence of the jury.

Ms. Campbell, do you have some record you want to make?

MS. CAMPBELL: Yes, Your Honor. We would renew our motions on Rule 29. Given the defendant's testimony and Mr. King's testimony I believe that there's even less evidence that Mr. Burrage distributed heroin to either Ms. Brown or Mr. Banka.

THE COURT: All right. I'll take the government's resistance as being the same as before.

The Court overrules the motion of the defendant based on Eighth Circuit law that the better practice is to submit the [391] case to the jury.

I do believe there's been sufficient evidence to generate jury questions on both counts of the indictment.

The Court will be in recess until 3:35, at which time we'll make record with regard to the instructions. We have to change some in light of the developments of this afternoon so we'll be in recess until 3:35.

(Short recess.)

THE COURT: Please be seated.

The record should show we're in open court without the jury for instructions.

Mr. Courter, has the government any suggested instructions that are not included in the Court's final jury instructions?

MR. COURTER: No, I don't believe so, Judge.

Does 19 need to be in, the mug shot one, since he admitted that he was convicted of two felonies?

MR. PIPER: Your Honor, we would be fine with taking that instruction out.

THE COURT: You want it out, Mr. Courter?

MR. COURTER: Yes, Judge.

THE COURT: Okay. And the defense wants it out, so we'll delete 19 from the final instructions.

Anything else, Mr. Courter?

MR. COURTER: No, Judge.

[392] THE COURT: All right. Thank you. Mr. Piper.

MR. PIPER: Yes, Your Honor, we have.

THE COURT: Mr. Piper, why don't you just sit and pull the microphone closer to you. That way I'll hear better.

Excuse me for interrupting.

MR. PIPER: Thank you, Your Honor. There are three instructions in our proposed that are not in the proposed finals: Our instruction 14, Definition of Resulting in Death; our 15, Definition of Proximate

Cause; and our 18, Proof of One Crime is Not Proof of a Different Crime.

THE COURT: Okay. Well, first of all, my 20 is mislabeled. 20 should be Tape-Recording. It says Testimony of a Defendant. That should be Wire Tap Or Other Tape-Recorded Evidence.

MR. COURTER: That's what our 20 is, Wire Tape Or Other Tape-Recorded Evidence.

THE COURT: Yes. I think the defense requested that, if I recall correctly.

MR. PIPER: That's correct, Judge.

THE COURT: Okay. My point was the Table of Contents is mislabeled, not the instructions. Okay. Let me get to defendant's 14.

Okay. The Court denies 14. The proximate cause is not what the law is, and defendant's 14 requests the proximate cause. That's overruled.

[393] THE COURT: 15. Okay. And 15, the Court's ruling is the same. I don't think that's the law, so 15 is overruled.

18, I don't think anything came in resembling that, Mr. Piper. Did I miss something?

MR. PIPER: Your Honor, the defendant did admit to distributing OxyContin during his direct testimony.

THE COURT: Mr. Courter, what's the government think of their proposed 18? Do you have a copy of it?

MR. COURTER: I do not.

THE COURT: Here what's it says: "You have heard evidence that the defendant committed an act similar to the offenses charged in the indictment."

Mr. Piper, you're equating OxyContin with heroin?

MR. PIPER: Your Honor, we're saying that his admission to having distributed that substance could be construed as an act similar to the act of distributing heroin.

THE COURT: Well, I'll ask the government what they think.

MR. COURTER: I guess I don't agree with that, Judge. If you had allowed me to go into his prior with the heroin, I could see that, but I guess we don't think it's necessary in this case based upon the testimony that came in from Mr. Burrage.

THE COURT: Okay. Well, I'm not going to give it. I don't think it's necessary.

[394] Okay. Any other record, Mr. Piper, you want to make?

MR. PIPER: Yes, Your Honor, on the Court's instruction No. 10.

THE COURT: Yes.

MR. PIPER: Given the Court's ruling on our instruction, and we do request the Court to strike the paragraph after sub 3, the explanation of what the meaning of "death resulting" is, in order to allow the jury to deliberate the strict element and to interpret it based on what the statute requires rather than on an interpretation of what the statute means with "death resulting."

THE COURT: So you're telling me you want an expansion of the sentence, "A contributing cause is a factor that although not the primary cause"—

MR. PIPER: We'd like to have it stricken from the instruction.

THE COURT: Okay.

Okay. That's overruled.

Anything else?

MR. COURTER: No, Your Honor.

MR. PIPER: No, Your Honor.

THE COURT: Okay. We'll be in recess till 9 o'clock tomorrow morning.

(Recess at 3:45 p.m. until 9 o'clock a.m., Wednesday, June 29, 2011.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume III

EXCERPT OF GOVERNMENT'S CLOSING ARG.
ON CONTRIBUTING FACTOR

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Wednesday, June 29, 2011
9:00 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge and a Jury.

* * * * *

[405] met right in front of the store.

You've also seen that on the HyVee surveillance video that law enforcement pulled in this case, and it shows the defendant going up to the driver's side

window where there was a conversation about procuring marijuana, and that there would potentially be conversations later on as to whether the defendant could also procure marijuana for Joshua Banka.

That is essentially the first part of count 1.

And there was never any conversation about the marijuana because, unfortunately, the defendant started using—excuse me, Joshua Banka started using the heroin immediately.

Tammy testified that they pulled into a nearby parking lot, that Mr. Banka injected himself with heroin, that it has a sedative nature, and he became very groggy, almost sleepy, that she waited there for approximately half an hour and then drove him directly back to their residence in Nevada, Iowa.

She further testified that Mr. Banka then was helped into the house. It appeared that he couldn't walk under his own power due to the effects of the heroin, keeping in mind that he hadn't used any heroin for the last 6 months, and he went to bed and slept until about midnight.

Now, the evidence and her testimony further shows that he also injected himself later that evening at approximately midnight, that she had checked on him to make sure that he was okay, that he had gotten out of bed approximately 5 o'clock in [406] the morning and probably injected heroin again while he was in the bathroom.

You know, she further checks on him at that 5 to 6 a.m. range, and he's sitting on the stool in the bathroom, appears to be asleep, but he's still breathing and she goes to bed.

And she wakes up at 10:30. She said it was her job to make sure he was up and she had to drive him to work at the pet store over in Ames, and she can't find him. She can't find her husband, and it's a small house. So she starts looking for him, and what's she find when she goes into the bathroom?

And what she finds, ladies and gentlemen, is her husband dead.

There's certainly no doubt that on the early morning hours of April 15th, 2010 that Joshua Banka died.

And it's exhibited in Government's Exhibit 16. He had slipped off the toilet. It appears the decedent died while sitting on the stool and fell over sideways into the shower.

She calls the paramedics. They arrived. As the testimony shows, there were certain things used medically by the paramedics but because he was gone, there was no bringing him back. He was dead.

The question then becomes as it relates to the second part of count 2, was the ingestion of the heroin that Joshua Banka bought from the defendant, Marcus Andrew Burrage, a [407] contributing factor in Joshua Banka's death?

And you heard two witnesses from the government testify about that, Dr. Jerri McLemore and Dr. Schwilke. Dr. McLemore was an assistant medical examiner here in the State of Iowa. Dr. Schwilke is a toxicologist.

And we went into full detail, and I won't go back through the pictures again, but she went into detail about her medical findings as it relates to her examination of the body of Joshua Banka. She talked about

the injection site. She talked about where they were located, how they would appear, the things along those lines; but most importantly, she talked about the physiological effects of heroin on the human body.

Now, there's certainly no doubt and the government does not dispute at all there's certainly no doubt that the decedent, Josh Banka, had ingested more than just heroin. I mean there's no doubt about that. It's in the toxicology reports. He smoked marijuana. That doesn't appear to be much of a factor one way or the other, but the other drugs are—the OxyContin, the Percocet, the things along those lines that were found in his system.

But the overwhelming and the highest concentration of drugs that were found in Joshua Banka's body was heroin.

As it shows, the therapeutic ranges, you can see it on the lab reports and the toxicology reports, those will be going back to the jury room with you for your examination and your [408] discussion as you deliberate.

That the overwhelming majority of the drugs found in his body, the highest concentration of drugs found in his body was in fact the heroin, the heroin that he had purchased from the defendant, Marcus Andrew Burrage.

And without a doubt she testified to a reasonable degree of medical certainty that the ingestion of the heroin that Joshua Banka bought from the defendant on April 14, 2010 was in fact a contributing factor to his death in the morning hours of April 15, 2010.

Dr. Schwilke confirmed those findings and reinforced those findings; but in fact, also in his opinion

the ingestion of the heroin that Joshua Banka had bought from the defendant, Marcus Andrew Burrage, was in fact a contributing factor to his death on April 15, 2010.

Based upon all the credible evidence in this case, ladies and gentlemen, the government has met its burden. It has proved beyond a reasonable doubt that on November 17th of 2009 the defendant, Marcus Andrew Burrage, distributed heroin to Breanne Brown in Ames, Iowa.

The government has also proven based upon all the credible evidence that you have heard that on April 14th, 2010 the defendant, Marcus Andrew Burrage, distributed heroin to Joshua Banka in Ames, Iowa.

The credible evidence also proves beyond a reasonable [409] doubt that the ingestion of that heroin by Joshua Banka, that he had purchased from the defendant, Marcus Andrew Burrage, was in fact a contributing factor to his death on April 15th of 2010.

The government has met its burden of proof. I would ask you to return guilty verdicts on all counts.

Thank you.

THE COURT: Ms. Campbell.

MS. CAMPBELL: Thank you. Your Honor, Mr. Courter, ladies and gentlemen of the jury.

There is one benefit of being a criminal defendant, and when I say one, I mean literally only one. There are lots of down sides of being a criminal defendant, but there is one large benefit, and that's the benefit of any doubt.

You see, Mr. Courter can say that what Mr. Burrage testified to wasn't true. He can say that it's not credible. He can ask the same question of him

over and over about whether or not he's the one on that audio tape.

But the thing is, we don't have to prove he wasn't. We don't have to prove he didn't sell the heroin to Joshua Banka. The government has the burden of proving beyond a reasonable doubt that the story they put on that stand is the real one, that their witnesses told the truth, that Tammy Noragon and that Breanne Brown were honest with you.

And not only that, not only do they have to show that their version is true, because that's their burden, they have to

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-cr-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

TRIAL TRANSCRIPT
Volume III

EXCERPT OF DEFENSE'S CLOSING ARG.
ON CAUSATION

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Wednesday, June 29, 2011
9:00 a.m.

BEFORE: The Honorable ROBERT W. PRATT, Chief Judge and a Jury.

* * * * *

[415] You wouldn't get on the stand with a—if you're going to make up a story, you wouldn't get on the stand and look at a surveillance camera of a person wearing a different outfit than what the witness

said you were wearing. The person on the video tape is obviously wearing jeans and a light-colored shirt not a blue jumpsuit. You can't tell who that is. You wouldn't take the stand and identify yourself.

The government has to disprove Marcus Burrage's testimony, and they can't.

Now, I want to touch briefly on causation. Now, obviously we're arguing that he's not guilty on both counts; but in the event that you reach the causation question on count 2, I just want you to remember that both doctors told you that they cannot say if Joshua Banka didn't use the heroin, he wouldn't have died. They can't tell you that.

That's not proof beyond a reasonable doubt on that element.

And you know what? The heroin didn't kill Josh Banka. Josh Banka killed Josh Banka by mixing a whole bunch of drugs.

Now, this case isn't just about Marcus Burrage. It's titled United States versus Marcus Burrage, but it's not just about Marcus Burrage, because, you see, we're Iowans. We want to trust our law enforcement. We want to believe what they tell us. We want to think that they have all of our best interests in mind. And we want to think that when an officer takes the

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-CR-095

UNITED STATES OF AMERICA,
Plaintiff

v.

MARCUS ANDREW BURRAGE,
Defendant

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

---

* * * * *

INSTRUCTION 10

ELEMENTS OF THE OFFENSE – COUNT TWO – DISTRIBUTION

The crime of distributing heroin, as charged in Count 2 of the indictment, has three elements, which are:

One, the defendant intentionally distributed heroin;

Two, at the time of the transfer, the defendant knew that it was heroin; and

Three, a death resulted from the use of the heroin.

For you to find the defendant guilty of the crime charged under Count 2, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime under Count 2.

Source: Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 2011 ed., § 21.841B (modified).

INSTRUCTION 11

DISTRIBUTION OF CONTROLLED SUBSTANCES RESULTING IN DEATH

If you find the defendant guilty of distribution as charged in Count 2, then you must determine, beyond a reasonable doubt, whether Joshua Abraham Banka died as a result of using the heroin distributed by the defendant. Again, the heroin must have been a contributing cause of the death.

Source: United States v. James Faulkner, 636 F.3d 1009 (8th Cir. 2011)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 4:10-CR-095

UNITED STATES OF AMERICA,
Plaintiff

vs.

MARCUS ANDREW BURRAGE,
Defendant

DEFENDANT'S PROPOSED JURY INSTRUTIONS

COMES NOW the defendant, Marcus Andrew Burrage, and submits the following proposed jury instructions.

/s/ Michael J. Piper
MICHAEL J. PIPER
Dickey and Campbell Law Firm
301 East Walnut Street, Ste. 1
Des Moines, Iowa 50309
TELEPHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: michael@dickeycampbell.com
ATTORNEY FOR DEFENDANT

CC via ECF:
Assistant U.S. Attorney John S. Courter

* * * * *

PROPOSED JURY INSTRUCTION NO. 13

ELEMENTS OF THE OFFENSE – COUNT TWO – DISTRIBUTION OF HEROIN RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count 2 of the indictment, has three elements, which are:

One, the defendant intentionally distributed heroin;

Two, at the time of the transfer, the defendant knew that it was heroin; and

Three, the use of the heroin was the proximate cause of a death.

For you to find the defendant guilty of the crime charged under Count 2, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime under Count 2.

Authority: Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 2011 ed., § 21.841B (modified); *United States v. McIntosh*, 236 F.2d 968, 972 (8th Cir. 2001); *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010).

PROPOSED JURY INSTRUCTION NO. 14
DEFINITION: RESULTING IN DEATH

The element "resulting in death" listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death.

Authority: *United States v. Hatfield*, 591 F3d. 945 (7th Cir. 2010).

PROPOSED JURY INSTRUCTION NO. 15
DEFINITION: PROXIMATE CAUSE

As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.

A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

Authority: Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, 2011 ed., § 8.35 (modified); United States v. Hatfield, 591 F.3d 945, 949.

PROPOSED JURY INSTRUCTION NO. 16

DISTRIBUTION OF CONTROLLED SUBSTANCES RESULTING IN DEATH

If you find the defendant guilty of distribution of heroin as charged in Count 2, then you must determine, beyond a reasonable doubt, whether Joshua Abraham Banka died as a result of using the heroin distributed by the defendant.

Authority: Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 2011 ed., § 21.841B (modified); United States v. McIntosh, 236 F.2d 968, 972 (8th Cir. 2001); United States v. Hatfield, 591 F.3d 945, 949.

PROPOSED INSTRUCTION NO. 17
LESSER-INCLUDED OFFENSE

If your verdict under Instruction ___ under Count 2 is not guilty, or if, after all reasonable efforts, you are unable to reach a verdict on Instruction ____, you should record that decision on the verdict forms and go on to consider whether defendant is guilty of the crime of Distribution of Heroin under this instruction. The crime of Distribution of Heroin, a lesser-included offense of the crime charged in Count 2 of the indictment, has two elements, which are:

One, the defendant intentionally distributed heroin; and

Two, at the time of the transfer, the defendant knew that it was heroin.

For you to find defendant guilty of this crime, a lesser-included offense, under Count 2, the Government must prove all of these elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime, a lesser included offense, under Count 2.

Authority: Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 2011 ed., § 3.10.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

4:10-cr-00095

UNITED STATES OF AMERICA,
Plaintiff

v.

MARCUS ANDREW BURRAGE,
Defendant

FINAL JURY INSTRUCTIONS

---

* * * * *

INSTRUCTION NO. 10

ELEMENTS OF THE OFFENSE – COUNT TWO – DISTRIBUTION OF HEROIN RESULTING IN DEATH

The crime of distributing heroin resulting in death, as charged in Count Two of the Indictment, has three essential elements, which are:

1. On or about April 14, 2010, the Defendant intentionally distributed heroin; and
2. At the time of the transfer, the Defendant knew that it was heroin; and
3. A death resulted from the use of the heroin.

For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the

Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death

For you to find the Defendant guilty of the crime charged under Count Two the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of this crime under Count Two.

INSTRUCTION NO. 11

LESSER-INCLUDED OFFENSE

If your verdict under Count Two, the elements of which are listed in Instruction No. 10, is not guilty, or if, after all reasonable efforts, you are unable to reach a verdict on Count Two, you should record that decision on the verdict form and go on to consider whether Defendant is guilty of the crime of Distribution of Heroin under this instruction. The crime of Distribution of Heroin, a lesser-included offense of the crime charged in Count Two of the Indictment, has two elements, which are:

1. On or about April 14, 2010, the Defendant intentionally distributed heroin; and
2. At the time of the transfer, the Defendant knew that it was heroin.

For you to find Defendant guilty of this crime, a lesser-included offense, under Count Two, the Government must prove both of these elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime, a lesser included offense, under Count Two.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CRIMINAL NO. 4:10-cr-095

UNITED STATES OF AMERICA,

Plaintiff

vs.

MARCUS ANDREW BURRAGE,

Defendant

[Filed 07/12/11]

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW the defendant, Marcus Andrew Burrage, by and through counsel, and submits the following brief in support of his motion for new trial.

TABLE OF CONTENTS

I. FACTS 2

II. ARGUMENT 2

A. THE COURT ERRED IN DENYING DEFENDANT'S PROPOSED JURY INSTRUCTIONS 3

B. THE GOVERNMENT ENGAGED IN PROSECUTORIAL MISCONDUCT 7

III. CONCLUSION 8

I. FACTS

Marcus Burrage was charged in a two count indictment with (1) knowingly and intentionally distributing a mixture or substance containing heroin on or about November 17, 2009, in the Southern District of Iowa, and (2) knowingly and intentionally distributing a mixture or substance containing heroin on or about April 14, 2010, in the Southern District of Iowa, and that death or serious bodily injury resulted from the use of the substance. He proceeded to trial, and was found guilty of both counts.

II. ARGUMENT

Under Federal Rule of Criminal Procedure 33, a district court may vacate a judgment and grant a new trial if justice so requires.

Unlike the standard to grant a motion for judgment of acquittal, when the court evaluates the evidence for the new trial motion, the evidence is no longer viewed in the light most favorable to the government. Instead, the court may grant a new trial motion "where it finds that the verdict is contrary to the weight of the evidence" or "where the evidence presented weighs heavily enough against the verdict that the court believes a miscarriage of justice may have occurred." *United States v. Davis*, 534 F.3d 903, 912 (8th Cir. 2008) *citing United States v. Smart*, 501 F.3d 862, 865 (8th Cir. 2007). The district court has broader discretion to grant a new trial under Rule 33 than it does to grant a motion for judgment of acquittal under Rule 29. *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002). In determining the appropriateness of granting a new trial, the district court should weigh the evidence and evaluate the credibility of the witnesses. *Davis*, 534 F.3d at 912.

The district court is free to disbelieve witnesses during this assessment. *United States v. Bertling*, 510 F.3d 804, 808 (8th Cir. 2007).

The Eighth Circuit Court of Appeals has identified a two-part test for reversible prosecutorial misconduct: (1) the prosecutor's remarks or conduct must have been improper; and (2) such remarks or conduct must have prejudicially affected defendant's substantive rights so as to deprive him of a fair trial. *United States v. Griffith*, 301 F.3d 880, 883 (8th Cir. 2002) (quoting *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000)). If the court reaches the second step, the factors the court considers are: (1) the cumulative effect of the misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) any curative actions taken by the trial court. *Id.*

While the defendant understands that the district court's authority to grant a new trial is to be exercised sparingly and with caution, *see United States v. Sturdivant*, 513 F.3d 795, 802 (8th Cir. 2008), the defendant submits that this case warrants such a remedy. Burrage submits that his conviction is a miscarriage of justice because the Court erred in denying his proposed jury instructions 13, 14, 15 and 16; and because the Government engaged in prosecutorial misconduct.

A. THE COURT ERRED IN DENYING THE DEFENDANT'S PROPOSED JURY INSTRUCTIONS 13, 14, 15, and 16.

The Defendant proposed jury instructions 13, 14, 15, and 16 with respect to the offense of distribution of heroin resulting in death. The Court denied the language used in Defendant's Proposed Instruction

No. 13, and denied Defendant's Proposed Instructions Nos. 14, 15, and 16.[1]

Defendant's Proposed Jury Instruction No. 13 states, in relevant part, "*Three*, the use of heroin was the proximate cause of a death" (underlined emphasis added). The Court rejected the use of the term "proximate cause," and stated the third element of Count 2 as: "A death resulted from the use of the heroin." Final Jury Instruction No. 10. In addition to the elements, however, the Court also added the following language:

> For you to find that a death resulted from the use of heroin, the Government must prove,

---

[1] Defendant's Proposed Jury Instruction No. 14 provided the following definition for "Resulting in Death": "The element 'resulting in death' listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death" (emphasis added).

Defendant's Proposed Jury Instruction No. 15 defined "proximate cause":

> As used in these instructions, the term 'proximate cause' means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

Defendant's Proposed Jury Instruction No. 16 states "If you find the defendant guilty of distribution of heroin as charged in Count 2, then you must determine, beyond a reasonable doubt, whether Joshua Banka died as a result of using the heroin distributed by the defendant."

> beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

Final Jury Instruction No. 10 (emphasis added). The Court denied Defendant's Proposed Jury Instruction 14 (Definition: Resulting in Death), and Defendant's Proposed Jury Instruction 15 (Definition: Proximate Cause).

Several circuits, including the Eighth Circuit, have held that the "death resulting" charge is a strict liability one, in which the court may not impose a foreseeability or proximate cause requirement. *See, e.g., United States v. Monnier*, 412 F.3d 859 (8th Cir. 2005); *United States v. Robinson*, 167 F.3d 924 (3rd Cir. 1999); *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994); *United States v. Houston*, 406 F.3d 1121 (9th Cir. 2005). However, the Seventh Circuit, while also endorsing the proposition that the "death resulting" element does not require foreseeability, has recently expressed reserve about the "strict liability" interpretation of the "death resulting" element. *See U.S. v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In the opinion, Judge Posner states that the strict liability interpretation "could lead to some strange results."[2] Judge Posner interprets the other circuits' use of strict liability to mean "simply the

---

[2] Such as a situation where, "unbeknownst to the seller of an illegal drug, his buyer was intending to commit suicide by taking an overdose of drugs, bought from that seller, which were not abnormally strong, and in addition the seller had informed the buyer of the strength of the drugs, so that there was no reasonable likelihood of an accidental overdose." *Hatfield*, 591 F.3d at 950.

omission of any reference to foreseeability or state of mind." *Hatfield*, 591 F.3d at 950. However, because the defendants in the case did not challenge the interpretation of the statute as imposing strict liability on them for death or injury to the recipients of their drugs, the circuit court did not reach the issue of whether the "death results" element creates strict liability. *Id.*

Here, the Court, in addition to denying Defendant's proposal of the criteria of proximate cause for establishing the "death resulting" element, accepted the Government's proposed language embellishing the requirement by inserting "contributing cause" as the standard. Government's Proposed Instruction No. 11; Final Jury Instruction No. 10. The government cited as its authority for the instruction the court's decision in *United States v. Faulkner*, 636 F.3d 1009 (8th Cir. 2011). However, the only use of the term "contributing factor" in that opinion is in the description of the case at the beginning of the opinion. *Faulkner*, 636 F.3d at 1012 ("[t]he jury also found that the Government proved beyond a reasonable doubt that heroin distributed pursuant to the conspiracy in count one was a *contributing factor* in the death of a third party and that the death was reasonably foreseeable to Faulkner") (emphasis added). *Faulkner* does not hold that the language "contributing factor" is required to be included in the jury instructions. Nor does the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, promulgated in 2011, require the use of any embellishing language to define the "death resulting" element.

A similar situation appears in the Seventh Circuit's opinion in *U.S. v. Hatfield*, 591 F.3d 945 (7th Cir.

2010). In that case, the government had embellished the jury instruction on "death resulting" by stating that "the controlled substances distributed by the defendants had to have been 'a factor that resulted in death or serious bodily injury,' and that although they 'need not be the primary cause of death or serious bodily injury' they 'must at least have played a part in the death or in the serious bodily injury.'" *Hatfield*, 591 F.3d at 947. The defendants' attorney objected to the addition as a confusing gloss, but the district judge refused to remove the addition. *Id.* The court of appeals reversed, holding that there was error in the instruction and it was not harmless. *Id.* at 951. The court stated that it did not understand "what a jury would make of 'primary cause' and 'played a part.' *Id.* at 949. The court also stated that "[a]ll that would have been needed to satisfy [the defendants' objection to the instruction] was to eliminate the addition to the statutory language, which was a good deal clearer than the addition and probably clear enough." *Id.* at 949.

The government's expert witnesses, Dr. McLemore, and Dr. Schwilke, could not testify within a medically reasonable certainty that the heroin was the proximate cause of death. Dr. McLemore stated that she couldn't tell whether .4 grams of heroin was toxic to Joshua Banka. She testified that there were several factors that contributed to Joshua Banka's death, including the marijuana that Joshua Banka has consumed. It is unclear how the jury would have evaluated this testimony in the light of a jury instruction that included an instruction on "proximate cause," or at least which did not include an explicit reference and instruction on "contributory cause."

The Court here erred in rejecting Defendant's proposal requirement of "proximate cause" in Final Jury Instruction 10 and in accepting the Government's proposal of "contributing cause" as the legal standard for the "death resulting" element. At the very least, the Court should have rejected both proposals and left the instruction to track the statutory language (as in the Model Jury Instruction), rather than trying to fit a decision into the "contributory cause" template that the Court injected into the "death resulting" element. For these reasons the Defendant was prejudiced by the Final Instructions and a new trial is warranted.

B. THE GOVERNMENT ENGAGED IN PROSECUTORIAL MISCONDUCT.

The Government, during its cross examination of the defendant, played the wiretap recording of the Government's cooperating witness, Breanne Brown, speaking to a person whom the Government purported to be the Defendant, Marcus Burrage, several times. After playing the recording, the Government attorney stated in court that it sounded to him like the Defendant on that recording. Defense counsel objected. The objection was overruled. This was in spite of the lead defense counsel having told the Government's attorney that the Defendant's expert witness had informed her that a person could not be identified by the voice heard on the tape. Defense counsel produced the expert's report to the Government attorney and inquired whether the government intended on offering "earwitness" testimony at trial, necessitating defense counsel to seek additional funding to procure the testimony of the expert witness. The Government attorney responded to Defense counsel that the Government was not planning on

presenting any "earwitnesses" regarding the recording. Defense counsel did not arrange for testimony by the expert witness. (See Exhibit A, Expert report; Exhibit B, Email with expert report; Exhibit C, Email chain; Exhibit D, Email from government.)

By telling the jurors in its final arguments that the voice on the recording sounded like the defendant, the Government's attorney was serving as the Government's own earwitness. This misconduct on the part of the prosecutor is clearly improper, and prejudicially affected the Defendant's substantive rights so as to deprive him of a fair trial. The improper testimony by the prosecutor, given to the jurors during the trial, and then argued during closing argument encouraging the jurors to serve as their own earwitnesses as to the recording, produced an overwhelming effect on the jury. The Court's recourse to curing this improper action by the prosecutor is to grant defendant a new trial.

III. CONCLUSION

For the above stated reasons, Marcus Andrew Burrage respectfully requests that the Court grant his motion for new trial.

/s/ Michael J. Piper
MICHAEL J. PIPER
Dickey and Campbell Law Firm
301 East Walnut Street, Ste. 1
Des Moines, Iowa 50309
TELEPHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: michael@dickeycampbell.com
ATTORNEY FOR DEFENDENT

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011, I electronically filed this document with Clerk of Court using the ECF system which will serve it on the appropriate parties.

/s/ Michael J. Piper

CC via ECF: Assistant U.S. Attorney John S. Courter

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUL 19 2013
OFFICE OF THE CLERK

No. 12-7515

IN THE

Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S OPENING BRIEF

JEFFREY T. GREEN
RYAN C. MORRIS
JEREMY M. BYLUND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ANGELA L. CAMPBELL*
GARY DICKEY JR.
DICKEY & CAMPBELL LAW FIRM PLC
301 East Walnut Street, Suite 1
Des Moines, IA 50309
(515) 288-5008
angela@dickeycampbell.com

Counsel for Petitioner Marcus Andrew Burrage
* Counsel of Record

July 19, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the independent cause of death of a person.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption above.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
ARGUMENT	12
I. SECTION 841(B)(1)(C)'S TWENTY-YEAR MANDATORY MINIMUM REQUIRES PROOF THAT USE OF THE DRUG DISTRIBUTED WAS A SUBSTANTIAL CAUSE OF DEATH AND THAT DEATH WAS FORESEEABLE.	12
A. The Text And Structure Of § 841 Establish That The "Death Results" Language Requires "But For" And Proximate Causation.	13
B. The Common Law Of Criminal Causation Requires "But For" Causation, Which Means Applying A Substantial Factor Test When There Is More Than One Cause.	16
C. The Common Law Requires A Finding Of Proximate Cause, Which In Criminal Law Means Foreseeability.	18

TABLE OF CONTENTS—continued

Page

D. The Presumption In Favor Of *Mens Rea* Also Confirms That Foreseeability Is Required. 22

1. The Text Of § 841 Indicates That *Mens Rea* Is A Necessary Element. 22

2. The Common Law Presumption Of *Mens Rea* Applies To The "Death Results" Element. 25

3. The Aggravated "Death Results" Charge Is Not A Strict Liability Crime..... 28

E. Heroin Use Was Not A Substantial Factor In Mr. Banka's Death, Nor Was Mr. Banka's Death Foreseeable. 29

II. CONTRIBUTING CAUSE IS NOT SUFFICIENT FOR A CONVICTION FOR DISTRIBUTION OF DRUGS RESULTING IN DEATH..... 31

A. The Text Of § 841 Does Not Support A Contributing Cause Standard. 32

B. If "Death Results" Can Be Read As Requiring Only "Contributing Cause" Then The Statute Is Gravely Ambiguous And The Rule Of Lenity Applies. 32

C. "But For" Cause Is Required And Is Not Satisfied By A Contributing Causation Standard..... 33

TABLE OF CONTENTS—continued

Page

D. Proximate Cause In The Criminal Context Requires A Closer Causal Connection Than The Contributing Cause Instruction Here. 36

CONCLUSION 38

APPENDIX: 21 U.S.C. § 841(a)-(b) 1a

TABLE OF AUTHORITIES

Page(s)

CASES

A.L.G. v. *State*, 736 P.2d 521 (Okla. Crim. App. 1987) 19, 20
Abney v. *State*, 766 N.E.2d 1175 (Ind. 2002) 17, 33
Aitchison v. *Reter*, 64 N.W.2d 923 (Iowa 1954) 36
Alleyne v. *United States*, 133 S. Ct. 2151 (2013) 22
Am. Ins. Co. of City of Newark, N.J. v. *Keane*, 233 F.2d 354 (D.C. Cir. 1956) 14
Babbitt v. *Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995) (O'Connor, J., concurring) 15
Black Hills Aviation, Inc. v. *United States*, 34 F.3d 968 (10th Cir. 1994) 14
Brown v. *Commonwealth*, 685 S.E.2d 43 (Va. 2009) 19
Brown v. *Gardner*, 513 U.S. 115 (1994) 13
Carter v. *United States*, 530 U.S. 255 (2000) 26
Cleveland v. *United States*, 531 U.S. 12 (2000) 33
CNG Transmission Mgmt. VEBA v. *United States*, 588 F.3d 1376 (Fed. Cir. 2009) 13
Commonwealth v. *Berggren*, 496 N.E.2d 660 (Mass. 1986) 19
Commonewealth v. *Uhrinek*, 544 A.2d 947 (Pa. 1988) 18
Consol. Aluminum Corp. v. *C.F. Bean Corp.*, 833 F.2d 65 (5th Cir. 1987) 20
Dean v. *United States*, 556 U.S. 568 (2009) 24, 25, 32

TABLE OF AUTHORITIES—continued

Page(s)

Equitable Life Assur. Soc. of U.S. v. *Gratiot*, 14 P.2d 438 (Wyo. 1932)..... 36
Flores-Figueroa v. *United States*, 556 U.S. 646 (2009)..... 23, 27
Glazier v. *State*, 843 P.2d 1200 (Wyo. 1992) 19
Harris v. *United States*, 536 U.S. 545 (2002), *overruled by Alleyne* v. *United States*, 133 S. Ct. 2151 (2013)..... 24
Jim Walter Res., Inc. v. *Riles*, 903 So. 2d 118 (Ala. Civ. App. 2004)..... 36
Jones v. *United States*, 526 U.S. 227 (1999) 35
Lanasa Fruit S.S. & Importing Co. v. *Universal Ins. Co.*, 302 U.S. 556 (1938)... 37
Liparota v. *United States*, 471 U.S. 419 (1985)..... 29
Martin v. *State*, 377 So. 2d 706 (Fla. 1979). 19
Morissette v. *United States*, 342 U.S. 246 (1952)..... 25, 28
Murakami v. *United States*, 398 F.3d 1342 (Fed. Cir. 2005)..... 13
People v. *Feezel*, 783 N.W.2d 67 (Mich. 2010)..... 14
People v. *Hudson*, 856 N.E.2d 1078 (Ill. 2006)..... 14, 20
Robbins v. *State*, 717 S.W.2d 348 (Tex. Crim. App. 1986) (en banc)..... 17
Robertson v. *Commonwealth*, 82 S.W.3d 832 (Ky. 2002)..... 14, 17
Scheffer v. *Washington City, V.M. & G.S.R. Co.*, 105 U.S. 249 (1881)..... 37
Standard Oil Co. of N.J. v. *United States*, 340 U.S. 54 (1950)..... 37

TABLE OF AUTHORITIES—continued

Page(s)

Staples v. *United States*, 511 U.S. 600 (1994) 16, 25, 26, 28, 29
State v. *Bingaman*, 655 N.W.2d 51 (N.D. 2002) 17
State v. *Crocker*, 431 A.2d 1323 (Me. 1981) 17
State v. *Cummings*, 265 S.E.2d 923 (N.C. Ct. App.), *aff'd*, 271 S.E.2d 277 (N.C. 1980) 19
State v. *Engstrom*, 487 P.2d 205 (Wash. 1971) (en banc) 19
State v. *Farner*, 66 S.W.3d 188 (Tenn. 2001) 19
State v. *Jaworsky*, 505 N.W.2d 638 (Minn. Ct. App. 1993)..... 19
State v. *Lillie*, 193 P.3d 1050 (Or. Ct. App. 2008) 18, 20
State v. *Malone*, 819 P.2d 34 (Alaska Ct. App. 1991)..... 17
State v. *Marshall*, 34 A.3d 540 (N.H. 2011) 15
State v. *Marty*, 801 P.2d 468 (Ariz. Ct. App. 1990) 14
State v. *Montoya*, 61 P.3d 793 (N.M. 2002). 17
State v. *Oimen*, 516 N.W.2d 399 (Wis. 1994) 18
State v. *Phillips*, 514 So. 2d 743 (La. Ct. App. 1987)..... 14
State v. *Vaughn*, 707 S.W.2d 422 (Mo. Ct. App. 1986)..... 19
State v. *Wassil*, 658 A.2d 548 (Conn. 1995) 17, 19
State v. *William*, 435 N.W.2d 174 (Neb. 1989) 15,18, 20
Stumpf v. *Panhandle E. Pipeline Co.*, 189 S.W.2d 223 (Mo. 1945) 36

TABLE OF AUTHORITIES—continued

Page(s)

Summers v. *Tice*, 199 P.2d 1 (Cal. 1948) (en banc) 35
U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 16
United States v. *Bailey*, 444 U.S. 394 (1980) 23
United States v. *Bass*, 404 U.S. 336 (1971). 33
United States v. *Harris*, 701 F.2d 1095 (4th Cir. 1983) 15
United States v. *Hatfield*, 591 F.3d 945 (7th Cir. 2010) 10, 21, 23
United States v. *Hayes*, 555 U.S. 415 (2009) (Roberts, C.J., joined by Scalia, J., dissenting) 32
United States v. *Martinez*, 588 F.3d 301 (6th Cir. 2009) 15
United States v. *McIntosh*, 236 F.3d 968 (8th Cir. 2001) 10
United States v. *Monnier*, 412 F.3d 859 (8th Cir. 2005) 10
United States v. *Monzel*, 641 F.3d 528 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011) 19, 20
United States v. *O'Brien*, 130 S. Ct. 2169 (2010) 26
United States v. *Pineda-Doval*, 614 F.3d 1019 (9th Cir. 2010) 15
United States v. *Robinson*, 167 F.3d 824 (3d Cir. 1999) 21
United States v. *U.S. Gypsum Co.*, 438 U.S. 422 (1978) 26
Webster v. *State*, 213 A.2d 298 (Del. 1965).. 19

TABLE OF AUTHORITIES—continued

Page(s)

Whitesides v. *State*, 88 P.3d 147 (Alaska Ct. App. 2004) 18
Witherspoon v. *State*, 33 So. 3d 625 (Ala. Crim. App. 2009) 17

STATUTES

8 U.S.C. § 1324 28
18 U.S.C. § 43 28
18 U.S.C. § 247 28
18 U.S.C. § 670 28
18 U.S.C. § 844 28
18 U.S.C. § 1038 28
18 U.S.C. § 1091 28
18 U.S.C. § 1347 28
18 U.S.C. § 1365 28
18 U.S.C. § 2113 28
18 U.S.C. § 2119 28
18 U.S.C. § 2237 28
18 U.S.C. § 2245 29
18 U.S.C. § 2261 29
18 U.S.C. § 2262 29
18 U.S.C. § 2332b 28
21 U.S.C. § 841 ..... passim
49 U.S.C. § 20703 29
49 U.S.C. § 30170(a)(1) 29

OTHER AUTHORITIES

1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* (2d ed. 1858) 26
1 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) ..... passim

TABLE OF AUTHORITIES—continued

Page(s)

4 William Blackstone, *Commentaries on the Laws of England* (1769) 26
57A Am. Jur. 2d *Negligence* § 437 (2013).... 36
Black's Law Dictionary (9th ed. 2009).. 17, 33, 36
Ctr. for Disease Control, *Unintentional Drug Poisoning in the United States* (July 2010), http://www.cdc.gov/homeandrecreationalsafety/pdf/poison-issue-brief.pdf 30
Edward Coke, *Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown. And Crimnal Causes.* (1797) 26
Francis Bacon, *The Elements of the Common Lawes of England* (1630)..... 26
Model Penal Code § 2.03 ..... 17, 35
Restatement (Second) of Torts § 433 cmt. d (1965) 33
U.S. Dep't of Justice, *Crime in the United States 2007*, Arrest Data Table 29 (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/data/ table_29.html 30
U.S. Dep't of Justice, *Crime in the United States 2007*, Arrest Table (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/arrests/index.html 30
W. Page Keeton et al., *Prosser and Keeton on Torts* § 41 (5th ed. 1984). 34, 35
Webster's New World College Dictionary (Victoria Neufeldt & David B. Guralnik eds., 3d ed. 1996) 13

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Eighth Circuit is reported at 687 F.3d 1015 and reprinted in the Joint Appendix (J.A.) at 52-70. The district court's judgment is unreported but reprinted at J.A. 40-51.

JURISDICTION

The Eighth Circuit issued its decision and judgment on August 6, 2012. J.A. 52. Petitioner filed a timely petition for a writ of certiorari, which this Court granted on April 29, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involved the interpretation of 21 U.S.C. § 841(a)-(b), which is reproduced in full in the appendix to this brief.

INTRODUCTION

Under the Controlled Substances Act, Congress outlawed the knowing or intentional sale of heroin, among other drugs, and imposed a twenty-year maximum sentence. 21 U.S.C. § 841(a), (b)(1)(C). However, "if death or serious bodily injury results from the use" of that heroin, § 841(b)(1)(C) imposes a mandatory minimum sentence of twenty years and up to life in prison. *Id.* § 841(b)(1)(C). In the decision below, the Eighth Circuit concluded that this twenty-year mandatory minimum is triggered if the use of heroin was a mere "contributing cause" of death. Accordingly, even though the heroin sold by Marcus Burrage could not be said to be a substantial factor in or a foreseeable cause of Joshua Banka's death, the court affirmed

the twenty-year minimum sentence imposed on Mr. Burrage. This was error.

Congress's use of the phrase "results from" in § 841(b)(1)(C) requires causation. And in the criminal context, this traditional causation requirement includes both a "but for" and proximate cause element. The criminal common law has long required a showing that the defendant's acts were a substantial factor in causing an injury and that the resulting injury was a foreseeable result of those acts. Here, however, the unrebutted evidence shows that the heroin sold by Mr. Burrage, only a part of which was consumed by Mr. Banka, was not a substantial factor in Mr. Banka's death, nor was that death a foreseeable result of Mr. Burrage's sale of the drug.

The jury instruction in this case allowed the prosecution to show only that the use of heroin was a "contributing cause" of Mr. Banka's death. J.A. 56. But a contributing cause standard has no place in criminal law, because it allows criminal liability to extend far beyond common law principles of criminal causation. The lower court erroneously imported a civil causation standard into the statute, divorcing the high degree of proof required to impose the harsh punishments mandated by § 841(b)(1)(C).

STATEMENT OF THE CASE

A. Statutory Background

Section 841(a) of the Controlled Substances Act, among other things, makes it "unlawful for any person knowingly or intentionally ... to ... distribute ... a controlled substance." 21 U.S.C. § 841(a). The Act then sets forth specific penalties for particular unlawful acts involving different types of controlled substances in different quantities. See *id.* § 841(b).

For cases like this one where the drug quantities fall under the lowest threshold (100 grams for heroin), § 841(b)(1)(C) provides that a person who violates subsection (a) "shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." *Id.* § 841(b)(1)(C). This provision also includes other enhancements. For instance, if the person violates subsection (a) "after a prior conviction for a felony drug offense has become final," then the sentence shall be "a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment." *Id.* Finally, the provision states that regardless of any other law, a court "shall not place on probation or suspend the sentence of any person sentenced under the provision of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results," and that the person shall not be "eligible for parole during the term of such a sentence." *Id.*

B. Factual Background

After a multi-day crime spree, Joshua Banka, a long-time drug addict, decided to engage in one more day of heavy drug use before entering a court ordered substance abuse program. Trial Tr. vol. 2, 188, June 28, 2011; J.A. 100. He spent Wednesday, April 14, 2010, purchasing drugs, stealing drugs, and using drugs—including OxyContin, heroin, marijuana, and other prescription drugs. J.A. 115-29. Mr. Banka and his wife[1] started their day on April 14 by smoking

---

[1] Mr. Banka's wife, Tammy Noragon, also an extensive drug user, knew that Mr. Banka had struggled with drug abuse since

marijuana at a former roommate's house. J.A. 127-28. While at the house, Mr. Banka stole his former roommate's prescription drugs, including OxyContin. J.A. 128. Mr. Banka later crushed the OxyContin, cooked it, and injected it into his system. J.A. 119-21. He also abused other prescription drugs that day, although his wife lost track of what drugs he used and when. J.A. 132. Later in the afternoon of April 14, Mr. Banka resolved to purchase heroin and texted Mr. Burrage to arrange the transaction. J.A. 101, 121.

Mr. Banka, who had recently returned to central Iowa after living out of state, had met Mr. Burrage one week earlier. J.A. 95, 98-99. In response to Mr. Banka's text message, Mr. Burrage agreed to meet Mr. Banka and his wife in a parking lot and sold Mr. Banka one gram of heroin for $200. J.A. 102-04. Mr. Banka immediately used some of the heroin that afternoon, and his wife drove him home. J.A. 105-06. Mr. Banka continued using various drugs throughout the evening and night of the 14th, and into the morning of April 15. J.A. 108-10. At 10:30 a.m. on April 15, Mr. Banka's wife found Mr. Banka dead in the bathroom and called the police. J.A. 111-12.

Upon arrival, law enforcement officers searched the house and Mr. Banka's vehicle. The officers located a small bag containing .59 grams of heroin, Oxycodone

---

he was 17 years old. Trial Tr. vol. 2, 220-21, June 28, 2011; J.A. 96. Ms. Noragon knew that Mr. Banka frequently abused a panoply of drugs. J.A. 96-97. Ms. Noragon also knew that Mr. Banka's substance abuse evaluation noted that he needed extensive outpatient treatment with daily meetings to address his substance abuse and mental health issues. Trial Tr. vol. 2, 188-89, June 28, 2011. Despite this knowledge, Ms. Noragon agreed to assist Mr. Banka on his drug spree on April 14. J.A. 100-01, 104, 116, 124.

tablets, a bottle of Baclofen, a bottle of clonazepam, alprazolam, a bottle of hydrocodone, marijuana residue, and a small bag of unidentified narcotics. J.A. 91-92; Trial Tr. vol. 1, 154-55, June 27, 2011. They also found full and used syringes, as well as unused empty syringes, a Mountain Dew can cut down to facilitate intravenous drug use, and a marijuana bong. J.A. 91-92; Trial Tr. vol. 2, 339-40, June 28, 2011. An autopsy and toxicology screen on Mr. Banka's body revealed his cause of death to be "mixed drug intoxication." J.A. 157.

The officers showed Mr. Banka's wife a photo line-up, and she identified Mr. Burrage as the heroin distributor. Trial Tr. vol. 2, 208-10, June 28, 2011. The police decided to include Mr. Burrage in the line-up because of a "controlled buy" they had conducted five months earlier, on November 17, 2009, where Mr. Burrage sold heroin to a police informant during an audio-recorded transaction. J.A. 53-54. The officers declined to arrest or charge Mr. Burrage with distribution at the time of the controlled buy. J.A. 77-78.

C. Trial Court Proceedings

On April 27, 2011, a grand jury returned a superseding indictment charging Mr. Burrage with distribution of heroin causing death under § 841(b)(1)(C), for the sale of heroin to Mr. Banka on April 14, 2010 (Count II), as well as simple distribution of heroin, for the previously uncharged controlled buy on November 17, 2009 (Count I). J.A. 40-41.

1. At trial, the prosecution called two experts to testify about the causes of Mr. Banka's death: Dr. Jerri McLemore, the medical examiner who conducted the autopsy, and Dr. Eugene Schwilke, the toxicologist who ran the screen of Mr. Banka's blood and urine. J.A. 137-39, 188-90. Both experts agreed that

the cause of Mr. Banka's death was *not* heroin overdose, but instead was "mixed-drug intoxication." J.A. 157, 191-92.

Dr. McLemore's April 16, 2010 autopsy of Mr. Banka yielded the following uncontested findings:

- Mr. Banka's blood panel showed recent use of benzodiazepines, such as clonazepam and alprazolam, marijuana, opiates, such as Oxycodone, morphine, and 6-Monoacetylmorphine ("6-MAM"), a derivative of heroin. J.A. 150-51.
- Mr. Banka had aspirated on his own vomit. J.A. 144-45.
- Mr. Banka had scarred vessels in his arms, indicating a long history of intravenous drug use. J.A. 145.
- There was evidence Mr. Banka was injecting drugs into other areas of his body, indicating extensive intravenous drug use. J.A. 145-47.
- Mr. Banka had developed a condition in his lungs, which indicated long-term intravenous drug use. J.A. 156-57.
- Mr. Banka had heart disease and his heart was twice the size and weight of a normal man's heart. J.A. 147.

In Dr. McLemore's opinion, the morphine in Mr. Banka's system was derived "at least in part" by heroin use. J.A. 153.[2] And she opined that Mr. Banka's morphine level was two and a half times higher than

---

[2] When the human body breaks down heroin, it metabolizes heroin into 6-Monoacetylmorphine and then into morphine. J.A. 192-205.

the published reference range for a therapeutic dose of morphine in a patient. *Id.*[3]

Dr. McLemore testified that the use of opiates, which Mr. Banka had abused for many years, creates a tolerance and that the amount of heroin that causes a given individual to overdose varies depending on that person's tolerance to the opiates. J.A. 167-69. As a result, Dr. McLemore could not say whether the approximately .41 grams of heroin that was missing from the one gram bag purchased from Mr. Burrage would have caused an overdose. J.A. 169. Dr. McLemore ultimately concluded that the cause of Mr. Banka's death was a "mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." J.A. 157.[4] In her opinion, the circumstances of the case were "consistent with those drugs, including the heroin, as contributing to death." J.A. 158.

Significantly, Dr. McLemore could not say that Mr. Banka would have lived if he had not taken the heroin. J.A. 159-60. She explained that if she could have made such a finding, her report would have read "heroin overdose" rather than "mixed drug intoxication." *Id.* Dr. McLemore also could not determine which drug caused Mr. Banka to vomit and then aspirate (inhale). J.A. 160, 166-67. Finally, she could

---

[3] Dr. McLemore explained that therapeutic range was "the range of the medication ... that you normally get if you are prescribed it and you take it as prescribed." J.A. 153.

[4] In the medical profession, according to Dr. McLemore, a "cause of death" is a disease or disease process or injury that brought about the death of a person. A "contributory" cause is a disease, disease process, or injury that aided in bringing about the death of a person. J.A. 159. The difference between the two is causation – a "contributory" cause means that it is not necessarily true that a person would not have died but for that cause.

not say that Mr. Banka would have died even if he had not used oxycodone. J.A. 170.

The prosecution also called the toxicologist, Dr. Schwilke, who testified that "every drug on this list" in Mr. Banka's system, with the exception of marijuana, had a depressant effect on the central nervous system. J.A. 193. A slowed breathing process, also called respiratory depression, is a common toxic effect when multiple central nervous system depressant medications are combined together. J.A. 194. Thus, while a certain amount of one particular drug may not be toxic, it may become toxic when mixed with other drugs because "there's a synergistic or overenhanced effect of the medication when multiple CNS depressant or central nervous system depressant drugs are taken at the same time." J.A. 195.

Dr. Schwilke reaffirmed Dr. McLemore's opinion that that cross-tolerance from a regular oxycodone user like Mr. Banka, who used oxycodone daily, would develop and raise the tolerance level for all the opiates. J.A. 203. Dr. Schwilke believed that the "201 nanograms per milliliter" of morphine in Mr. Banka's system—the level that the prosecution claimed was lethal—may not be toxic to a regular drug user like Mr. Banka. J.A. 202-03. Dr. Schwilke opined that the prosecution's reliance on the therapeutic level of morphine as the cause of death could be misplaced because it was like "compar[ing] apples and oranges." J.A. 202. Like Dr. McLemore, Dr. Schwilke could not say that Mr. Banka would have lived if he had not taken the heroin, and similarly could not state that if Mr. Banka had not taken the oxycodone, he still would have died. J.A. 208.

2. At the close of the prosecution's evidence, Mr. Burrage moved for judgment of acquittal, in part, because the prosecution had not proven that Mr. Ban-

ka's heroin use was the "but for" cause of Mr. Banka's death. The motion was denied. J.A. 213-18.

At the conclusion of the case, Mr. Burrage proposed several jury instructions on the standard for causation under § 841(b)(1)(C). Proposed Instruction 13 provided that "the use of the heroin [must have been] the proximate cause of a death." J.A. 236. Proposed Instruction 14 stated in its entirety, "The element 'resulting in death' listed in Count 2 of the indictment, requires the government to prove beyond a reasonable doubt that the distribution of the heroin was the proximate cause of death." J.A. 237. Proposed Instruction 15 defined "proximate cause":

> As used in these instructions, the term "proximate cause" means a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

J.A. 238.

The district court declined to give Mr. Burrage's proposed instructions to the jury, stating that they did not reflect the causation standard in the Eighth Circuit. J.A. 221-23. Instead, the court adopted the prosecution's proposed instruction on causation, which incorporated the concept of "contributing cause." J.A. 234. Over Mr. Burrage's objection, the district court ultimately instructed the jury:

> For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

J.A. 241-42.

The jury convicted Mr. Burrage of both counts. J.A. 40. The district court sentenced him to 240 months, imposing the twenty-year maximum for the distribution count, and the twenty-year minimum for the "death results" count, to be served concurrently. J.A. 42. Mr. Burrage appealed. J.A. 52.

D. The Eighth Circuit's Decision

On appeal, Mr. Burrage argued, among other things, that the district court's jury instruction was erroneous because the court failed to give a proximate cause instruction for the "death results" count. J.A. 57.

The Eighth Circuit held that there is no proximate cause requirement under § 841(b)(1)(C) to establish that death "results from" use of a controlled substance. J.A. 59-60. The court relied entirely on its prior decision in *United States* v. *McIntosh*, 236 F.3d 968, 972-73 (8th Cir. 2001), which held that a showing of proximate cause is not required under § 841(b)(1). J.A. 58. Moreover, the court explained that in *United States* v. *Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), it had previously opined that "contributing cause" was the law of the Eighth Circuit after *McIntosh*. J.A. 59. Although the court recognized that the Seventh Circuit in *United States* v. *Hatfield*, 591 F.3d 945 (7th Cir. 2010), had expressly rejected a "contributing cause" instruction, J.A. 60, it explained

that it was bound by its precedent and declined to follow *Hatfield*. J.A. 60, 70.

SUMMARY OF ARGUMENT

The plain meaning of the text of the criminal statute punishing the distribution of drugs resulting in death under 21 U.S.C. § 841 requires a finding of "but for" and proximate cause. Under the criminal common law, this causal standard translates into a substantial factor that causes a foreseeable result. A foreseeability requirement avoids creating a new category of strict liability crimes. Foreseeability, which is the basis for a finding of recklessness or negligence, provides the necessary *mens rea* requirement under the precedents of this Court. Moreover, policy considerations support the conclusion that proximate cause applies. Because a large number of criminal statutes incorporate "death results" or very similar language, the definition of this phrase will have wide ranging effect. The facts of this case satisfy neither the substantial factor nor the foreseeability requirements, and this Court should reverse Mr. Burrage's conviction.

Under the long-established common law of criminal causation, the contributing cause instruction given by the district court is insufficient to establish criminal liability when "but for" cause is required. While the Solicitor General attempts to import a less stringent causation standard from civil law into common law "but for" causation, the traditional criminal law standard should apply because of the differing policies behind criminal and civil law. Moreover, the drastic difference in potential punishment if "death results" reinforces the need to apply the stricter causal standards of criminal law. Finally, the contributing cause instruction is insufficient when proximate cause is required. Even under the civil proxi-

mate cause precedents of this Court the instruction that was given fails.

ARGUMENT

Section 841(b)(1)(C) requires that, before the mandatory minimum sentence of twenty years is imposed[5] on a defendant who distributes a controlled substance, the prosecution must prove that use of that controlled substance was a substantial factor in causing death, and that the death was foreseeable. These basic causation principals follow directly from Congress's use of the phrase "results from" in § 841(b)(1)(C), because this phrase incorporates stringent "but for" and proximate causation standards of criminal law.

The lower court's standard of "contributing cause" has no place in § 841(b)(1)(C). This is a civil causation standard that satisfies neither the foreseeability nor the substantial factor test.

I. SECTION 841(B)(1)(C)'S TWENTY-YEAR MANDATORY MINIMUM REQUIRES PROOF THAT USE OF THE DRUG DISTRIBUTED WAS A SUBSTANTIAL CAUSE OF DEATH AND THAT DEATH WAS FORESEEABLE.

The text and structure of § 841(b)(1)(C), background common law principles, and policy considerations establish that the twenty-year mandatory minimum requires a showing of "but for" and proximate cause, which means that use of the drug distributed was a substantial factor in causing the death and

---

[5] The penalty is even greater in cases where defendants have a prior conviction: the statutory penalty is zero to thirty years, but if "death results" then the penalty jumps to a mandatory life sentence

that the death must have been foreseeable. The foreseeability requirement further avoids creating a vast new category of strict liability crimes. Indeed, numerous criminal statutes have language similar to the "results from" language in § 841(b)(1)(C), and a foreseeability requirement avoids upsetting the stringent causality standards typically required to establish criminal liability. Because the evidence in this case cannot satisfy either the substantial factor or foreseeability causation requirements, Mr. Burrage's conviction should be overturned.

A. The Text And Structure Of § 841 Establish That The "Death Results" Language Requires "But For" And Proximate Causation.

The text and structure of § 841(b)(1)(C) plainly require a showing of both "but for" and proximate causation before the mandatory minimum twenty years can be imposed. This follows from Congress's use of the phrase "results from." First, this phrase signifies a causal connection. *Webster's New World College Dictionary* 1145 (Victoria Neufeldt & David B. Guralnik eds., 3d ed. 1996) (defining result as "to happen or issue as a consequence or effect"). And this Court has accordingly explained that the meaning of "results of" "is naturally read simply to impose the requirement of a causal connection." *Brown* v. *Gardner*, 513 U.S. 115, 119 (1994) (assuming that proximate causation applies to veterans' compensation statute). Numerous courts have likewise held that similar language requires causation. [6]

---

[6] *See also CNG Transmission Mgmt. VEBA* v. *United States*, 588 F.3d 1376, 1379 (Fed. Cir. 2009) ("The plain meaning of the term 'results in' is 'causes.'"); *Murakami* v. *United States*, 398 F.3d 1342, 1351-1352 (Fed. Cir. 2005) (holding that the provi-

In criminal statutes, the phrase "results from" requires both "but for" and proximate causation. As Professor LaFave explains, when crimes are defined "to require not merely conduct but also a specified *result* of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003) (emphasis added). In other words, "it must be determined that the defendant's conduct was the cause in fact of the result, which usually ... means that but for the conduct the result would not have occurred." *Id.* And, "[i]n addition, even when cause in fact is established, it must be determined that any variation between result intended ... or hazarded ... and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." *Id.*[7]

---

sion of the Civil Liberties Act allowing redress for harms occurring "as a result of" certain government actions means "as a consequence or effect of the governmental actions"); *Black Hills Aviation, Inc.* v. *United States*, 34 F.3d 968, 975 (10th Cir. 1994) (holding that "use of the plain language—'as a result of'—is logically interpreted to mean 'caused by' ... [not] 'connected with'"); *Am. Ins. Co. of City of Newark, N.J.* v. *Keane*, 233 F.2d 354, 360 (D.C. Cir. 1956) (defining the verb "result" as "'[t]o proceed, spring, or arise as a consequence, effect, or conclusion'") (quoting *Merriam-Webster New International Dictionary* (2d ed. 1953)).

[7] *See also State* v. *Marty*, 801 P.2d 468, 471 (Ariz. Ct. App. 1990) ("In Arizona, both 'but for' causation and proximate cause must be established in a criminal case."); *People* v. *Hudson*, 856 N.E.2d 1078, 1083 (Ill. 2006) (holding that Illinois requires proximate cause in felony murder cases, which is composed of "two distinct requirements: cause in fact and legal cause"); *Robertson* v. *Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002) (requiring cause in fact as a part of proving proximate cause); *State* v. *Phillips*, 514 So. 2d 743, 745 (La. Ct. App. 1987) ("Cause-in-fact as well as proximate or legal cause of a homicide must be proved beyond a reasonable doubt."); *People* v. *Feezel*, 783 N.W.2d 67,

This reading of "results from" is confirmed by the interpretation of similarly worded statutes. For example, in *Babbitt* v. *Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995), Justice O'Connor, in interpreting the Endangered Species Act, explained that "parties should be held liable ... only if their ... actions proximately cause death or injury ...." *Id.* at 712 (O'Connor, J., concurring); see also *United States* v. *Pineda-Doval*, 614 F.3d 1019, 1026 (9th Cir. 2010) (interpreting an act criminalizing the transportation of illegal aliens resulting in death, and stating that "when a criminal statute requires that the defendant's conduct has *resulted* in an injury, 'the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.'" (emphasis added) (quoting *United States* v. *Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986)); *United States* v. *Martinez*, 588 F.3d 301, 318-19 (6th Cir. 2009) (holding that "proximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death'"); *United States* v. *Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) (interpreting the phrase "death results" in 18 U.S.C. § 242 to mean that the "death [must] foreseeably and naturally result[] from the rights-violating conduct" (internal quotation marks omitted)).

The design of 21 U.S.C. § 841(b)(1)(C) reinforces that "death results" requires a strict causal standard.

---

74 (Mich. 2010) (holding that the term "cause" has a "'unique, technical meaning'" in the criminal law context, requiring both factual or "but for" cause and proximate cause) (quoting *People* v. *Schaefer*, 703 N.W.2d 774, 784 (Mich. 2005)); *State* v. *William*, 435 N.W.2d 174, 177 (Neb. 1989) (requiring "but for" and proximate cause for felony murder); *State* v. *Marshall*, 34 A.3d 540, 544 (N.H. 2011) (adopting "but for" and proximate cause as the standard for drug-related crimes resulting in death).

U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction is a holistic endeavor, ... and, at a minimum, must account for a statute's full text, language ... [and] structure...") (internal quotation marks omitted) (internal citation omitted). In the statute, Congress attached severe penalties to circumstances when "death results." In the present case, the death results language raised the sentencing range from a maximum of twenty years to a twenty-year minimum up to life. And, if a defendant has a prior controlled substance conviction, then the repercussions are even more severe: a mandatory life sentence. Moreover, the statute provides that "the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results ..." 21 U.S.C. § 841(b)(1)(C). The harsh penalties that apply when "death results" suggest that Congress intended correspondingly stringent causal standards to also apply.

B. The Common Law Of Criminal Causation Requires "But For" Causation, Which Means Applying A Substantial Factor Test When There Is More Than One Cause.

A "but for" causation requirement is also required by the traditional rule that courts should "construe the statute in light of the background rules of the common law ...." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (citing *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978)). The common law has long required "but for" causation as a minimum

standard in criminal cases.[8] Indeed, the Model Penal Code states that "[c]onduct is the cause of a result when ... it is an antecedent but for which the result in question would not have occurred." Model Penal Code § 2.03(1). The Solicitor General does not dispute that at a minimum "but for" causation is required. Br. Opp'n 16. And the basic meaning of "but for" is "[t]he cause without which the event could not have occurred." *Black's Law Dictionary* 250 (9th ed. 2009).

However, when more than one cause contributed to a result, the proper test to establish "but for" causation is whether "the defendant's conduct [was] a substantial factor in bringing about the forbidden result[.]" LaFave, *supra* § 6.4(b), at 468-69.[9] Professor

---

[8] *Witherspoon* v. *State*, 33 So. 3d 625, 627-28 (Ala. Crim. App. 2009) (citing "but for" language for criminal liability from § 13A-2-5, Ala. Code 1975); *State* v. *Crocker*, 431 A.2d 1323, 1325 (Me. 1981) (upholding a "but for" standard of causation in criminal cases); *State* v. *Montoya*, 61 P.3d 793 (N.M. 2002) (requiring "but for" causation); *State* v. *Bingaman*, 655 N.W.2d 51, 56 (N.D. 2002) (adopting a "but for" standard); *Robbins* v. *State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986) (en banc) (requiring "but for" causal connection); *see also supra* note 7.

[9] *See, e.g.*, *State* v. *Malone*, 819 P.2d 34, 36 (Alaska Ct. App. 1991) (holding that "the defendant's conduct need not be the sole factor ... the test is whether the defendant's conduct was a 'substantial factor' in bringing about the result" while reviewing criminal assault charges); *State* v. *Wassil*, 658 A.2d 548, 551 (Conn. 1995) (holding that the defendant's conduct must contribute "substantially and materially, in a direct manner, to the victim's injuries" and affirming a conviction for first degree manslaughter and sale of narcotics); *Abney* v. *State*, 766 N.E.2d 1175 (Ind. 2002) (holding that intoxication offenses required proof that defendant's operation of a motor vehicle while intoxicated was a "substantial cause" of the resulting death, not a mere "contributing cause"); *Robertson*, 82 S.W.3d at 836 (requiring that the criminal act be a "substantial factor" in bringing about the result and affirming conviction for second-degree

LaFave states that this test is applicable when "two causes, each alone sufficient to bring about the harmful result, operate together to cause it." *Id.* at 468. Thus, criminal liability can attach only if the defendant's actions would have *independently* caused the death.

C. The Common Law Requires A Finding Of Proximate Cause, Which In Criminal Law Means Foreseeability.

In addition to proof of "but for" or substantial causation, the common law also requires the prosecution to prove that the defendant's actions were not only a cause of the result, but also that the result was a foreseeable one. This requirement is most often labeled "proximate cause." LaFave, *supra* § 6.4, at 464 (internal quotation marks omitted). The common law reinforces that "proximate cause" is an indispensible element to hold a defendant criminally liable.[10] Prox-

---

manslaughter); *William*, 435 N.W.2d at 177 (requiring that the defendant's act be the "predominating cause" or the "substantial factor" which results in the victim's death and affirming conviction for felony motor vehicle homicide); *State* v. *Lillie*, 193 P.3d 1050, 1053 (Or. Ct. App. 2008) (viewing "tests of factual causation—'directly contributed,' 'substantial factor in bringing about,' and resulting 'foreseeable consequences'—as synonymous" and affirming conviction of murder); *Commonwealth* v. *Uhrinek*, 544 A.2d 947, 951 (Pa. 1988) (holding that "[t]he defendant's conduct must be a direct and substantial cause of the injury" and reversing conviction of homicide by vehicle); *State* v. *Oimen*, 516 N.W.2d 399, 404 (Wis. 1994) (holding that "an actor causes death if his or her conduct is a 'substantial factor' in bringing about that result" and affirming conviction of felony-murder).

[10] *See, e.g.*, *Whitesides* v. *State*, 88 P.3d 147, 150 (Alaska Ct. App. 2004) (explaining that "the normal meaning of the words 'direct' and 'result' imply that the defendant's conduct must, at a minimum, be a 'proximate cause' of the victim's physical injury"

imate cause "is a bedrock rule of both tort and criminal law." *United States* v. *Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt. a (2010) (calling proximate cause a "requirement[ ] for liability in tort"); W. Page Keeton et al., *Prosser*

---

while reviewing conviction for sale of heroin and possession of methamphetamine); *Wassil*, 658 A.2d at 551 (stating that "to prove causation, the state is required to demonstrate that the defendant's conduct was a 'proximate cause' of the victim's death" and affirming a conviction for first degree manslaughter and sale of narcotics); *Webster* v. *State*, 213 A.2d 298, 302-03 (Del. 1965) (explaining that a statute requiring that "death results" should be understood to require direct or proximate causation and affirming conviction for involuntary manslaughter); *Martin* v. *State*, 377 So. 2d 706, 707 (Fla. 1979) (holding that the proximate cause standard for a conviction of death resulting from distribution of heroin is constitutional); *Commmonwealth* v. *Berggren*, 496 N.E.2d 660, 662 (Mass. 1986) ("[T]he proper standard of causation for [motor vehicle homicide] is the standard of proximate cause..."); *State* v. *Jaworsky*, 505 N.W.2d 638, 643 (Minn. Ct. App. 1993) (holding that proximate cause is the standard of causation in involuntary manslaughter cases); *State* v. *Vaughn*, 707 S.W.2d 422, 426 (Mo. Ct. App. 1986) (using a proximate cause standard for criminal liability in homicide cases); *State* v. *Cummings*, 265 S.E.2d 923, 925-26 (N.C. Ct. App.) (holding that death must proximately result from defendant's unlawful acts in conviction for involuntary manslaughter), *aff'd*, 271 S.E.2d 277 (N.C. 1980); *A.L.G.* v. *State*, 736 P.2d 521, 522 (Okla. Crim. App. 1987) (requiring proximate cause for misdemeanor-manslaughter cases); *State* v. *Farner*, 66 S.W.3d 188, 191-92 (Tenn. 2001) (reversing conviction for criminally negligent homicide after trial court failed to instruct jury on proximate causation); *Brown* v. *Commonwealth*, 685 S.E.2d 43, 46 (Va. 2009) (applying proximate causation to criminal cases and affirming conviction of involuntary manslaughter); *State* v. *Engstrom*, 487 P.2d 205, 209 (Wash. 1971) (en banc) (applying proximate causation to negligent homicide cases); *Glazier* v. *State*, 843 P.2d 1200, 1204 (Wyo. 1992) (applying proximate cause and affirming conviction of aggravated vehicular homicide).

and Keeton on Torts § 41 at 263 (5th ed. 1984) (stating that "an essential element of the plaintiff's cause of action for negligence, or ... any other tort, is ... 'proximate cause'")), *cert. denied*, 132 S. Ct. 756 (2011). "The purpose of this rule is clear: 'legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.'" *Monzel*, 641 F.3d at 535-36 (quoting Keeton et al., *supra*, at 264).

Proximate cause in the criminal context means, after "but for" cause is established, that criminal defendants should only be held liable for the foreseeable results of their actions.[11] Foreseeability is generally defined as "'whether any ordinarily prudent man would have foreseen that damage would probably result from his act.'" *Consol. Aluminum Corp.* v. *C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987) (quoting F. James & R. Perry, *Legal Cause*, 60 Yale L.J. 761, 786 (1951)) (detailing definitions of foreseeability and their geneses). Even the Solicitor General concedes

---

[11] *See, e.g.*, *Hudson*, 856 N.E.2d at 1083 ("[F]oreseeability is a necessary component of a proximate cause analysis"); *William*, 435 N.W.2d at 177 ("[W]here the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.") (quoting *State* v. *Spates*, 405 A.2d 656, 660 (Conn. 1978)); *A.L.G.*, 736 P.2d at 522 (imposing criminal liability "'[w]here events are foreseeable and naturally result from one's criminal conduct'") (quoting *United States* v. *Hayes*, 589 F.2d 811, 821 (5th Cir. 1979)); *see also Lillie*, 193 P.3d at 1053 (viewing "tests of factual causation—'directly contributed,' 'substantial factor in bringing about,' and resulting 'foreseeable consequences'—as synonymous").

that foreseeability is a common element of proximate cause. Br. Opp'n 11 n.*.

Policy considerations confirm that proximate cause is required to impose a mandatory-minimum sentence of twenty years on a defendant under § 841(b)(1)(C). Without this limitation, the severe penalties in § 841(b)(1)(C) would extend far beyond what Congress intended. See *Hatfield*, 591 F.3d at 948; *United States* v. *Robinson*, 167 F.3d 824, 831-32 (3d Cir. 1999). Suppose, for example, that heroin use impaired a driver, who could not then avoid being hit by another driver in a speeding car who ran a red stop light. The heroin use may have "contributed" to the driver's death, but the distributor would not have foreseen the negligence of the second driver (or perhaps even that the drug user would get in a car). Section 841(b)(1)(C) requires something more exacting before the person who distributed the drug faces a mandatory minimum sentence of twenty years to life from a death that was really caused by the second speeding driver. It requires that death or serious bodily injury actually "results from" the drug use. The Eighth Circuit erroneously imported a civil causation standard into the statute, divorcing the high degree of proof required to impose the harsh punishments mandated by § 841(b)(1)(C).

Moreover, if causation is not proximately limited, then Mr. Banka's wife's aiding and abetting Mr. Banka in stealing and purchasing drugs is a contributing cause. Mr. Banka's former roommate was a contributing cause as well for failing to properly secure his stash of OxyContin and other prescriptions drugs from Mr. Banka and his wife. The doctors that prescribed pain medication to Mr. Banka for his back problems were contributing causes. Indeed, there are hundreds of causes that "contributed" to Mr. Banka's

death under the prosecution's theory. Because such a result cannot be what Congress intended, proximate cause should limit the criminal liability under the statute.

D. The Presumption In Favor Of *Mens Rea* Also Confirms That Foreseeability Is Required.

Foreseeability is not only required by common law standards of criminal proximate causation, but it is also required by the necessary element of *mens rea* that presumptively applies to all criminal statutes. The four general types of *mens rea* are purpose, knowledge, recklessness, and negligence; the last two are based on principles of foreseeability (subjective foreseeability for recklessness and objective foreseeability for negligence). LaFave, *supra* § 5.1(c), at 337.

1. The Text Of § 841 Indicates That *Mens Rea* Is A Necessary Element.

The text of § 841 proves that not only does the underlying violation have a *mens rea* element, but so does the "death results" element.[12]

Section 841 provides:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person *knowingly or intentionally*--

---

[12] This Court's decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), removes any doubt that "death results" is an element of the offense. In *Alleyne*, the Court held that an aggravating fact that led to a higher mandatory minimum sentence was an element of the crime that must be proved to the jury. 133 S. Ct. at 2162-63. Under § 841(b)(1)(C), the mandatory minimum sentence increases from zero years to twenty years if death results.

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> ....
>
> (b) Penalties
>
> ....
>
> [(1)](C) In the case of a controlled substance in schedule I or II, ... such person shall be sentenced to a term of imprisonment of not more than 20 years and *if death or serious bodily injury results* from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life ..."

21 U.S.C. § 841(a)-(b)(1)(C) (emphases added).

While the phrase "knowingly or intentionally" only appears in subsection (a), that mental state must extend to all subsequent elements of the offense, including the "death results" element. See *Flores-Figueroa* v. *United States*, 556 U.S. 646, 646-47 (2009) (finding that "knowingly" applied to subsequent elements of an offense). "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code Comments 123). Thus in § 841, the *mens rea* requirement must continue to apply to every element.

Even if "knowingly" does not apply to the "death result" element in § 841(b)(1)(C), at a minimum recklessness is required. "[T]he Model Penal Code ... provides that proof of guilt of a statute that does not specify a state of mind or other standard of culpability requires proof of at least recklessness." *Hatfield*,

591 F.3d at 950-51 (citing Model Penal Code § 2.02(3) (1962)).

The Solicitor General, in opposition to the Petition, relied on *Dean* v. *United States*, 556 U.S. 568 (2009), to argue that "death results" contains no *mens rea* requirement. Br. Opp'n 10-11. The Court in *Dean* found that the "discharge provision" of 18 U.S.C. § 924(c)(1)(A) did not have a *mens rea* component because, in part, the "brandishing provision" in the same subsection was specifically defined later in the statute to contain a *mens rea* component. 556 U.S. at 573-74. In other words, the Court followed the principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 573 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Dean is inapplicable here for multiple reasons. First, *Dean*, by its own terms, applies only to a sentencing factor. 556 U.S. at 574. Sentencing factors do not enjoy the same protections in the common law that elements do: "Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts." *Harris* v. *United States*, 536 U.S. 545, 549 (2002), *overruled on other grounds by Alleyne*, 133 S. Ct. 2151. Thus, *Dean's* rationale cannot apply to "death results" which is a central element in the aggravated crime in § 841(b)(1)(C). See *supra* note 12.

Second, *Dean*'s rationale cannot extend to the distinct provision at issue. In *Dean*, the Court concluded that a criminal prohibition lacked a *mens rea* compo-

nent because Congress had included a *mens rea* element in a separate prohibition (discharge of a weapon versus brandishing a weapon). 556 U.S. at 570, 577. Here, on the other hand, there is only one unified prohibition and the knowledge requirement specified in (a) must apply to the entire prohibition. Indeed, the district court even read the "knowingly or intentionally" requirement of (a) into subsection (b) by requiring the jury to find that Mr. Burrage knew it was heroin, even though the heroin element is found in subsection (b)(1)(C) under "Penalties" ("In the case of a controlled substance in schedule I"). *Dean* is inapplicable.

2. The Common Law Presumption Of *Mens Rea* Applies To The "Death Results" Element.

Holding that the "death results" element requires a finding of *mens rea* comports with "the background rules of common law." *Staples*, 511 U.S. at 605 (citing *U.S. Gypsum Co.*, 438 U.S. at 436-37).

The *mens rea* requirement is "universal and persistent in mature systems of law," one "almost as instinctive as the child's familiar exculpatory 'But I didn't mean to ....'" *Morissette* v. *United States*, 342 U.S. 246, 250-51 (1952). The Solicitor General's opposition to a more stringent causality standard, Br. Opp'n 10, threatens "by a feat of construction radically to change the weights and balances in the scales of justice ... [T]o strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morissette*, 342 U.S. at 263; see also *Staples*, 511 U.S. at 605 (The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") (quoting *U.S. Gypsum Co.*, 438 U.S. at 436); 1 Joel

Prentiss Bishop, *Commentaries on the Criminal Law* 260 § 227 (2d ed. 1858) ("the essence of an offence is the wrongful intent, without which it cannot exist"); 4 William Blackstone, *Commentaries on the Laws of England* 21 (1769) ("[T]o constitute a crime against human laws, there must be, first, a vicious will"); 3 Edward Coke, *Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown. And Criminal Causes.* 107 (1797) ("*Actus non facit reum, nisi mens sit rea*"—an act is not guilty if the mind is not guilty); Francis Bacon, *The Elements of the Common Lawes of England* 65 (1630) ("All crimes have their conception in a corrupt intent").

Also, the difference in the potential severity of punishment between when "death results" (twenty years to life) and when it does not (up to twenty years) confirms that the death results element requires proof of *mens rea*. See, e.g., *Staples*, 511 U.S. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*"); *U.S. Gypsum Co.*, 438 U.S. at 442 n.18 (noting that "[t]he severity of [the] sanctions provides further support for our conclusion that the ... Act should not be construed as creating strict-liability crimes"); see also *United States* v. *O'Brien*, 130 S. Ct. 2169, 2177 (2010) (stating that a "drastic, sixfold increase [in sentence] that strongly suggests a separate substantive crime"). Moreover, the additional and grave penalties specified for defendants with prior convictions (see *supra* Part I.A.) also support the application of the common law presumption to this statute in particular.

The Solicitor General in his opposition cited *Carter* v. *United States*, 530 U.S. 255, 269-70 (2000), in support of his erroneous argument that the presumption

in favor of *mens rea* is only applicable to avoid criminalizing otherwise lawful conduct. Br. Opp'n 10 (citing *United States* v. *X-Citement Video*, Inc., 513 U.S. 64, 72-73 (1994)). In so arguing, the Solicitor General resurrects an argument that garnered zero votes from this Court in *Flores-Figueroa*, a case decided nine years after *Carter*. In *Flores-Figueroa*, the statute at issue punished someone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" while committing an enumerated predicate crime. 556 U.S. at 646-47 (emphasis removed). The Solicitor General argued that it did not have to prove that the defendant knew the identification card contained the identity of another person (as opposed to a fictitious identity). *Id.* at 648. That case could not have turned on protecting the otherwise innocent because the defendant would have already committed a predicate crime *and* used a false ID card. Tellingly, the Court rejected the Solicitor General's argument that "the defendant's necessary knowledge that he has acted 'without lawful authority,' make[s] it reasonable" to "read the statute's language as dispensing with the knowledge requirement." *Id.* at 656. Instead, the Court read the word "knowingly" to apply to each element. *Id.* at 651-52.

While the Solicitor General relies heavily on language from *Dean* to support his argument about otherwise innocent conduct, Br. Opp'n 10, *Dean* is inapplicable to the case at bar for the reasons stated *supra* pp. 24 to 25. In addition, in *Dean* the Court's concern was about the inherent risk in the conduct of using a loaded gun to rob a bank, but that same level of risk is not at play here. Selling drugs is wrong, but it is not equivalent to the risk associated with handling a loaded gun in the course of a bank robbery.

3. The Aggravated "Death Results" Charge Is Not A Strict Liability Crime.

Finally, § 841 is not comparable to the narrow categories of statutes that do not require *mens rea*. For example, § 841 is in no way comparable to "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent." *Morissette*, 342 U.S. at 251 n.8. Nor is § 841 comparable to "public welfare" or "regulatory" offenses where the Court has understood Congress to impose a form of strict liability. *Staples*, 511 U.S. at 606. Public welfare statutes almost always "provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary," *id.* at 616, much less a mandatory sentence of twenty years or life. Considering the severe penalty for the current offense, it cannot be considered a public welfare offense.

Moreover the "death results" language is common in federal criminal statute. See, e.g., 18 U.S.C. § 43 (Force, Violence, and Threats Involving Animal Enterprises); 18 U.S.C. § 247 (Damage to Religious Property); 18 U.S.C. § 670 (Theft of Medical Products); 18 U.S.C. § 844 (Importation, Manufacture, Distribution, and Storage of Explosive Materials); 21 U.S.C. § 841(b)(1)(A)(viii) (Prohibited Acts A (Meth)); 18 U.S.C. § 1038 (False Information and Hoaxes); 18 U.S.C. § 1091 (Genocide); 8 U.S.C. § 1324 (Bringing in and Harboring Certain Aliens); 18 U.S.C. § 1347 (Heath Care Fraud); 18 U.S.C. § 1365 (Tampering with Consumer Products); 18 U.S.C. § 2113 (Bank Robbery); 18 U.S.C. § 2119 (carjacking); 18 U.S.C. § 2332b (Acts of Terrorism Transcending National Boundaries); 18 U.S.C. § 2237 (Failure to Heave to,

Obstruction of Boarding, or Providing False Information); 18 U.S.C.§ 2245 (sexual abuse resulting in death); 18 U.S.C. § 2262 (Interstate Violation of Protection Order); 18 U.S.C. § 2261 (Interstate Domestic Violence); 49 U.S.C. § 30170(a)(1) (reporting requirements for motor vehicle safety); and 49 U.S.C. § 20703 (Accident Reports and Investigation). The Eighth Circuit's ruling, if upheld, would place all of these statutes, and others, into a new and broad category of crimes for which a defendant may be held strictly liable for a death or serious bodily injury. Given the presumption against strict liability crimes, *Staples*, 511 U.S. at 606, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), the Court should reject such a drastic expansion.

E. Heroin Use Was Not A Substantial Factor In Mr. Banka's Death, Nor Was Mr. Banka's Death Foreseeable.

The record in this case affirmatively establishes that heroin use was *not* a substantial cause in Mr. Banka's death and that Mr. Banka's death was *not* a foreseeable consequence of his partial use of the heroin Mr. Burrage sold him. At trial, both of the prosecution's expert witnesses testified that the "but for" cause of Mr. Banka's death was "mixed drug intoxication," J.A. 157, 191-92, and that heroin was not an independent cause of that death, J.A. 159-60, 208. The expert testimony also established that Mr. Banka took many drugs that would have contributed to the slowing down of Mr. Banka's respiratory system, which caused his death. J.A. 54, 154. Without evidence that the heroin distributed by Mr. Burrage could have independently caused Mr. Banka's death the substantial factor test cannot be met.

Dr. McLemore, for example, could not say whether the approximately .41 grams of heroin that was miss-

ing from the one gram bag purchased from Mr. Burrage would have caused Mr. Banka to overdose. J.A. 169. This is because Mr. Banka had abused opiates for many years, and such drug use creates a tolerance. J.A. 167-69. The amount of heroin that causes an individual to overdose depends greatly on that person's tolerance to opiates. J.A. 168-69. Given these facts, the substantial factor test cannot be satisfied because, as Professor LaFave points out, the substantial factor test only applies to situations where "two causes, each alone sufficient to bring about the harmful result, operate together to cause it." *Supra* § 6.4(b), at 468. Neither of the doctors could testify that the heroin alone would have been sufficient to bring about Mr. Banka's death. J.A. 159-60, 208.

Similarly, the evidence cannot support a finding that Mr. Banka's death was foreseeable. Mr. Burrage had only known Mr. Banka for a short period of time, and only for a few days according to Mr. Banka's wife. J.A. 98. Such a short acquaintanceship makes it unlikely that Mr. Burrage knew of Mr. Banka's plans to go on a drug-using spree or about Mr. Banka's health problems. Moreover, there is no evidence that the heroin that Mr. Burrage distributed to Mr. Banka was particularly strong or that 1 gram, J.A. 103, was a particularly dangerous amount. Given the relatively small number of overdoses compared to the number of drug possessors (at most 2%),[13] these facts do

---

[13] In 2007, approximately 8,000 people died from "unintentional drug poisoning" from heroin and cocaine. Ctr. for Disease Control, *Unintentional Drug Poisoning in the United States* (July 2010), http://www.cdc.gov/homeandrecreationalsafety/pdf/poison-issue-brief.pdf. That same year, 395,854 people were arrested for possessing heroin and/or cocaine. *Compare* U.S. Dep't of Justice, *Crime in the United States 2007*, Arrest Data Table 29 (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/data/table_29.

not support a finding that the hazard produced by Mr. Burrage would ordinarily lead to the death of a buyer of heroin. Mr. Banka's death is simply too "extraordinary" a consequence for Mr. Burrage to face the severe punishment in § 841(b)(1)(C). LaFave, *supra* § 6.4, at 464.

This is not to say that the common law requirements of substantial factor and foreseeability present problems of proof in drug cases. If the prosecution's experts could have determined that the heroin sold to Mr. Banka would have independently caused Mr. Banka's death then the substantial factor test could be satisfied, but that was not proven here. Likewise, if it had been shown that Mr. Burrage should have known about the drug spree or should have known that the drugs were of a dangerous quantity or quality, then foreseeability could be satisfied. But, here, the evidence was too weak to satisfy these necessary causation standards. Mr. Burrage's conviction must be overturned.

II. CONTRIBUTING CAUSE IS NOT SUFFICIENT FOR A CONVICTION FOR DISTRIBUTION OF DRUGS RESULTING IN DEATH.

Regardless of whether the Court endorses the proximate cause standard advocated by Mr. Burrage, the Court should reverse because the district court erred by submitting the contributing factor instruction.[14] A

---

html, *with id.* Arrest Table (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/arrests/index.html.

[14] The jury instruction given at trial read: "For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the Defendant was a contributing cause of Joshua Ban-

contributing factor standard fails to satisfy any interpretation of the causation standards required.

A. The Text Of § 841 Does Not Support A Contributing Cause Standard.

Most fundamentally, the district court's use of the contributing factor standard finds no support in the text of § 841(b)(1)(C). Had Congress intended the lesser contributing factor standard to apply, there are a variety of ways in which Congress could have drafted the statute that would not have implicated "but for" and proximate causation standards. For example, Congress could have written the statute to impose a penalty of twenty years to life if "such substance contributed to the death or serious bodily injury of another," or if "such substance played any part in the death or serious bodily injury of another." But that is not what Congress wrote, Congress wrote in the "results in" language instead, and as discussed above in *supra* Part I.A., that language carries with it a settled meaning in criminal common law.

B. If "Death Results" Can Be Read As Requiring Only "Contributing Cause" Then The Statute Is Gravely Ambiguous And The Rule Of Lenity Applies.

Any reading of the statute that would allow a contributing cause instruction would mean that the statute is gravely ambiguous. *Dean*, 556 U.S. at 577 ("'To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute.'") (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-39 (1998); see also *United States* v. *Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., joined by Scalia, J., dissenting) ("Because construction of a criminal

---

ka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death." J.A. 241-42.

statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.") (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990)); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (stating that the rule of lenity is founded, in part, on "fair warning ... of what the law intends to do if a certain line is passed."). Under this Court's precedent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (citing *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Thus if the statute is ambiguous, the stricter causal standards should attach.

C. "But For" Cause Is Required And Is Not Satisfied By A Contributing Causation Standard.

Contributing cause is an inadequate jury instruction when "but for" cause is required. As discussed above, the common law of criminal causation requires "but for" causation at a minimum. See *supra* notes 7-8. "But for" is "[t]he cause without which the event could not have occurred." *Black's Law Dictionary*, *supra*, at 250. Contributing cause does not meet this traditional "but for" definition. It is a much more lenient causal standard, defined merely as: "A factor that — though not the primary cause — plays a part in producing a result." *Id.*

As noted, under "but for" causation, when more than one cause contributed to the result, then the act of the defendant must have been a "substantial factor" leading to the proscribed result. See *supra* note 9. This showing is not required to establish contributing cause, and substantiality was explicitly rejected in the district court's jury instruction. Moreover, not

every action that may have contributed to a harm, also necessarily qualifies as a substantial factor. Restatement (Second) of Torts § 433 cmt. d (1965); see also *Abney*, 766 N.E.2d at 1177 (jury instruction requiring only a "contributing cause" was error when "substantial cause" was required).

The Solicitor General concedes that at least "but-for causation" is required, but contends that "contributing cause" could be "but-for" cause in some circumstances. Br. Opp'n 16. But this contention relies entirely upon principles of civil tort law which allows that "'combined conduct, viewed as a whole, is a but-for cause of the [harm].' When 'application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm].'" *Id.* (quoting Keeton et al., *supra*, at 268). Prosser and Keeton make clear, however, that this is a civil tort test and an alternative to the "substantial factor test." Keeton et al., *supra*, at 268. Such a standard has no place in criminal law.

As Professor LaFave observes, "with crimes, where the consequences of a determination of guilt are more drastic (death or imprisonment, generally accompanied by moral condemnation, as contrasted with a mere money payment) it is arguable that a closer relationship between the result achieved and that intended or hazarded should be required." LaFave, *supra* § 6.4(c), at 472. Professor LaFave continues to endorse the substantial factor test for criminal law: "Was the defendant's conduct a substantial factor in bringing about the forbidden result?" *Supra* § 6.4(b), at 469. The weight of the common law stands behind the substantial factor test in the criminal context. See *supra* note 9.

The differing policy goals behind criminal and tort law also counsel against applying more lenient civil standards of causality to § 841. For instance, a lesser standard of causation in the civil context necessarily assumes other devices to mitigate against liability for an overdetermined harm such a joint and several liability, burden shifting, comparative fault, insurance, and bankruptcy. Indeed, in the oft-cited example of *Summers* v. *Tice*, 199 P.2d 1 (Cal. 1948) (en banc), the California Supreme Court recognized that justice required the burden of proof to fall upon the co-defendant in circumstances where it was impossible for a plaintiff to show which of the two negligent actors caused his harm. But such a result would never be constitutionally tolerable had the co-defendants been tried for assault and the prosecution relieved of its duty to prove its case against both defendants beyond a reasonable doubt. Nor can a criminal defendant transfer his liberty interests through insurance or discharge his deprivation through bankruptcy, like a civil defendant may do. Thus, a number of other legal devices that make a broadened concept of causation tolerable in civil cases are largely unavailable to the criminal defendant.

The alternative test cited by the Solicitor General is meant to ensure that victims of civil torts are not left "without a remedy in the face of the fact that had none of [the tortfeasors] acted improperly the plaintiff would not have suffered harm." Keeton et al., *supra*, at 268-69. In criminal law, however, where severe penalties and moral condemnation apply, more stringent causality is necessary to ensure that prosecutors satisfy their burden with respect to charges of aggravated versions of crimes. See, e.g., *Jones* v. *United States*, 526 U.S. 227, 251-52 (1999). For example, even for strict liability offenses, the Model Penal

Code provides that causation is not established unless the actual result is a probable consequence of the actor's conduct to protect "against the limitless extrapolation of liability without fault." Model Penal Code § 2.03, Explanatory Note. Moreover, the severe penalties that apply for violation of § 841(b)(1)(C) call for a stricter causal standard. Those convicted under the statute face up to life in prison, and some face mandatory life. Such stiff penalties should not attach unless the defendants' actions substantially caused the death, not merely played minor contributing roles. Thus, the Solicitor General's alternative civil tort theory should not be extended to criminal law.

D. Proximate Cause In The Criminal Context Requires A Closer Causal Connection Than The Contributing Cause Instruction Here.

Not every contributing cause is also a proximate cause.[15] According to the common law, criminal defendants should only be held liable for foreseeable harms. See *supra* note 11. But not every cause that contributes to a result is foreseeable.

Moreover, if this Court endorses the "contributing cause" instruction, then a new and broad category of aggravated crimes will become strict liability crimes.

---

[15] *Jim Walter Res., Inc.* v. *Riles*, 903 So. 2d 118, 125 (Ala. Civ. App. 2004) (stating that "all contributing causes are not necessarily proximate causes"); *Aitchison* v. *Reter*, 64 N.W.2d 923, 927 (Iowa 1954) (noting that the less stringent contributing cause, not proximate cause, is required); *Stumpf* v. *Panhandle E. Pipeline Co.*, 189 S.W.2d 223, 227 (Mo. 1945) (stating that "it is not sufficient that plaintiff['s] ... negligence contributed to the cause ... of his injury ... [but plaintiff's negligence] must have been a proximate cause"); *Equitable Life Assur. Soc. of U.S.* v. *Gratiot*, 14 P.2d 438 (Wyo. 1932); *see also* 57A Am. Jur. 2d *Negligence* § 437 (2013).

Strict liability means "[l]iability that does not depend on actual negligence or intent to harm ...." *Black's Law Dictionary*, *supra*, at 998. Including a jury instruction of proximate cause, with its focus on foreseeability, avoids this expansion of criminal liability.

Even according to this Court's civil precedent, drawing "the line between the proximate and the remote causes" requires that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Scheffer* v. *Washington City, V.M. & G.S.R. Co.*, 105 U.S. 249, 252 (1881) (quoting *Milwaukee & St. P.R. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). Likewise, the Court has insisted that proximate cause is "the efficient cause and not a merely incidental cause which may be nearer in time to the result." *Lanasa Fruit S.S. & Importing Co.* v. *Universal Ins. Co.*, 302 U.S. 556, 562 (1938). Finally, proximate cause "'refers to that cause which is most nearly and essentially connected with the loss as its efficient cause.'" *Standard Oil Co. of N.J.* v. *United States*, 340 U.S. 54, 58 (1950) (quoting *Dole* v. *New England Mut Marine Ins. Co.*, 7 F.Cas 837, 853 (D. Mass. 1864)). But contributing cause, encompassing any cause that "plays a part in producing a result," is a far more lenient standard than proximate cause. *Black's Law Dictionary*, *supra*, at 250.

The district court's instruction on contributing cause was error, and, at a minimum, Mr. Burrage should get a new trial.

CONCLUSION

For all of these reasons, the Court should overturn Mr. Burrage's conviction and remand the case for a new trial.

Respectfully submitted,

JEFFREY T. GREEN
RYAN C. MORRIS
JEREMY M. BYLUND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ANGELA L. CAMPBELL*
GARY DICKEY JR.
DICKEY & CAMPBELL LAW FIRM PLC
301 East Walnut Street, Suite 1
Des Moines, IA 50309
(515) 288-5008
angela@dickeycampbell.com

Counsel for Petitioner Marcus Andrew Burrage
* Counsel of Record

July 19, 2013

APPENDIX

APPENDIX

1. 21 U.S.C. § 841(a)-(b) provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of

such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than twenty years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any ana-

logue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of

supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than twenty years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the ab-

sence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior convic-

tion, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than twenty years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not

to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such persons shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised

release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than twenty years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

RESPONDENT'S BRIEF

No. 12-7515

In the Supreme Court of the United States

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Section 841(b)(1)(C) of Title 21 of the United States Code provides an increased sentencing range when "death * * * results from the use of [a controlled] substance" trafficked by a defendant. The questions presented are as follows:

1. Whether the defendant may be convicted under the "death results" provision when the use of the controlled substance was a "contributing cause" of the death, as the jury was instructed in petitioner's case.

2. Whether the defendant may be convicted under the "death results" provision without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Summary of argument 13
Argument:
Petitioner's jury was properly instructed on the elements of the "death results" offense in 21 U.S.C. 841(b)(1)(C) 15
I. As a matter of causation in fact, death "result[ed] from the use" of the heroin petitioner distributed because that heroin was a contributing cause of the victim's death by mixed-drug intoxication 17
A. Like many criminal laws, the "death results" provision does not require strict but-for causation 17
1. Criminal law generally does not insist on but-for causation 18
2. "Contributing cause" is the appropriate test for causation in fact 22
3. The "death results" provision in particular is satisfied by a showing that use of the controlled substance contributed to the victim's death 27
B. Petitioner was properly convicted under the "death results" provision 31
II. Once the government establishes that a controlled substance was a cause in fact of a drug-overdose death, the "death results" provision does not require a separate jury instruction on foreseeability 33
A. The "death results" provision does not require a separate instruction on foreseeability in a drug-overdose case 34

Table of Contents—Continued: Page

B. Petitioner's argument that a separate instruction on foreseeability is required because the "death results" provision contains a *mens rea* requirement is unsound 41
C. Congress has long acquiesced in lower courts' uniform understanding that the "death results" provision does not require instruction on foreseeability in a case involving a drug-overdose death 46
D. The "death results" provision would require a jury instruction on foreseeability in some cases, but an ordinary drug-overdose case does not implicate that requirement 48
E. If adopted, petitioner's foreseeability argument would at most entitle him to a new trial, not an acquittal 51
Conclusion 52

TABLE OF AUTHORITIES

Cases:

Babbitt v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) 36
Bates v. *United States*, 522 U.S. 23 (1997) 43
Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 39
Brown v. *Gardner*, 513 U.S. 115 (1994) 36
Commonwealth v. *McLeod*, 477 N.E.2d 972 (Mass.), cert. denied, 474 U.S. 919 (1985) 20
Commonwealth v. *Osachuk*, 681 N.E.2d 292 (Mass. App. Ct.), review denied, 691 N.E.2d 580 (Mass. 1997) 19
Cox v. *State*, 808 S.W.2d 306 (Ark. 1991) 20, 26, 32

Cases—Continued: Page

CSX Transp., Inc. v. *McBride*, 131 S. Ct. 2630 (2011) 32, 47, 48, 49
Dean v. *United States*, 556 U.S. 568 (2009) ..... *passim*
Flores-Figueroa v. *United States*, 556 U.S. 646 (2009) 44, 45
Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 16
Holsemback v. *State*, 443 So. 2d 1371 (Ala. Crim. App. 1983) 20, 26
June v. *Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009) 27
Muscarello v. *United States*, 524 U.S. 125 (1998) 31
Pacific Operators Offshore, LLP v. *Valladolid*, 132 S. Ct. 680 (2012) 15
Paroline v. *United States*, cert. granted, No. 12-8561 (June 27, 2013) 26
People v. *Bailey*, 549 N.W.2d 325 (Mich. 1996) 20, 25
People v. *Jennings*, 237 P.3d 474 (Cal. 2010) 19, 25
People v. *Lewis*, 57 P. 470 (Cal. 1899) 21, 26
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 19, 25
Reynolds v. *United States*, 132 S. Ct. 975 (2012) 31
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 48
Russello v. *United States*, 464 U.S. 16 (1983) 44
State v. *Burkhart*, 103 P.3d 1037 (Mont. 2004) 46
State v. *Christman*, 249 P.3d 680 (Wash. Ct. App.), review denied, 257 P.3d 666 (Wash. 2011) 25, 30
United States v. *Barbosa*, 271 F.3d 438 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002) 42
United States v. *Branham*, 515 F.3d 1268 (D.C. Cir. 2008) 42
United States v. *Briseno*, 163 Fed. Appx. 658 (10th Cir.), cert. denied, 547 U.S. 1157 (2006) 42

Cases—Continued: Page

United States v. *Brower*, 336 F.3d 274 (4th Cir.), cert. denied, 540 U.S. 936 (2003) 42
United States v. *Carranza*, 289 F.3d 634 (9th Cir.), cert. denied, 537 U.S. 1037 (2002) 42
United States v. *Carrera*, 259 F.3d 818 (7th Cir. 2001) 42
United States v. *Collazo-Aponte*, 281 F.3d 320 (1st Cir.), cert. denied, 537 U.S. 869 (2002) 42
United States v. *Gamez-Gonzalez*, 319 F.3d 695 (5th Cir.), cert. denied, 538 U.S. 1068 (2003) 42
United States v. *Garcia-Frias*, 239 Fed. Appx. 575 (11th Cir. 2007) 42
United States v. *Hatfield*, 591 F.3d 945 (7th Cir. 2010) 32, 48, 50
United States v. *Houston*, 406 F.3d 1121 (9th Cir.), cert. denied, 546 U.S. 914 (2005) 45
United States v. *King*, 345 F.3d 149 (2d Cir. 2003), cert. denied, 540 U.S. 1167 (2004) 42
United States v. *Lanier*, 520 U.S. 259 (1997) 31
United States v. *Leachman*, 309 F.3d 377 (6th Cir. 2002), cert. denied, 538 U.S. 969 (2003) 47
United States v. *Martinez*, 588 F.3d 301(6th Cir. 2009), cert. denied, 131 S. Ct. 538 (2010) 39
United States v. *McIntosh*, 236 F.3d 968 (8th Cir.), cert. denied, 532 U.S. 1022 (2001) 11, 47
United States v. *Monnier*, 412 F.3d 859 (8th Cir. 2005), cert. denied, 546 U.S. 1116 (2006) 12
United States v. *Park*, 421 U.S. 658 (1975) 41
United States v. *Patterson*, 38 F.3d 139 (4th Cir. 1994), cert. denied, 514 U.S. 1113 (1995) 35, 47
United States v. *Plenty Arrows*, 946 F.2d 62 (8th Cir. 1991) 33

Cases--Continued: Page

United States v. *Rebmann*, 226 F.3d 521 (6th Cir. 2000), overruled on other grounds by *United States* v. *Leachman*, 309 F.3d 377 (6th Cir. 2002) 47
United States v. *Robinson*, 167 F.3d 824 (3d Cir.), cert. denied, 528 U.S. 846 (1999) 40, 47
United States v. *Sheppard*, 219 F.3d 766 (8th Cir. 2000), cert. denied, 531 U.S. 1200 (2001) 42
United States v. *Soler*, 275 F.3d 146 (1st Cir.), cert. denied, 535 U.S. 1071 (2002) 47
United States v. *Swallow*, 109 F.3d 656 (10th Cir. 1997) 50
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 51
United States v. *Villarce*, 323 F.3d 435 (6th Cir. 2003) 42
United States v. *Webb*, 655 F.3d 1238 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012) 47
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 31, 45
Vallery v. *State*, 46 P.3d 66 (Nev. 2002) 50
Wilson v. *State*, 24 S.W. 409 (Tex. Crim. App. 1893) 20

Statutes, regulations and rules:

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 35
§ 1002, 100 Stat. 3207-2 4
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387 35
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1236 3

Statutes, regulations and rules—Continued: Page

Controlled Substances Act, 21 U.S.C. 801 *et seq.* .....*passim*
21 U.S.C. 811-812 3
21 U.S.C. 812(b)(1) 2, 31
21 U.S.C. 812(b)(2) 3
21 U.S.C. 812(c):
Sched. I(b)(10) 2
Sched. II(a)(4) 2
21 U.S.C. 841 3
21 U.S.C. 841(a) 38, 44
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b) 2
21 U.S.C. 841(b)(1) 11, 15, 42, 44
21 U.S.C. 841(b)(1)(A)-(B) 2
21 U.S.C. 841(b)(1)(C) 2, 13, 15, 16, 37
21 U.S.C. 841(b)(1)(E)(i)-(ii) 3
21 U.S.C. 841(b)(2)-(3) 3
21 U.S.C. 848 35
21 U.S.C. 848(m)(4) (1988) 35
21 U.S.C. 960(b)(1)-(3) 2
Fair Sentencing Act of 2010, Pub. L. No. 111-220:
§ 2, 124 Stat. 2372 4
§ 4, 124 Stat. 2372 4
Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, § 3, 114 Stat. 9 4
Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* 47, 48
Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. No. 110-425, § 3, 122 Stat. 4828 4

Statutes, regulations and rules—Continued: Page

Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, § 2, 112 Stat. 2681-759 4
21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 3006, 116 Stat. 1805 4
8 U.S.C. 1324(a)(1)(B)(iv) 37
10 U.S.C. 881(b) 38
10 U.S.C. 950t(2) 38
10 U.S.C. 950t(7) 38
10 U.S.C. 950t(8) 38
10 U.S.C. 950t(9) 38
10 U.S.C. 950t(11)(A) 38
10 U.S.C. 950t(12) 38
10 U.S.C. 950t(13)(A) 38
10 U.S.C. 950t(14) 38
10 U.S.C. 950t(17) 38
10 U.S.C. 950t(23) 38
10 U.S.C. 950t(24) 38
10 U.S.C. 950t(29) 38
18 U.S.C. 34 37
18 U.S.C. 37(a) 37
18 U.S.C. 38(b)(3) 38
18 U.S.C. 43(b)(1) 37
18 U.S.C. 175c(c)(3) 37
18 U.S.C. 241 37
18 U.S.C. 242 37
18 U.S.C. 245(b) 37
18 U.S.C. 247(d)(1) 37
18 U.S.C. 248(b) 38
18 U.S.C. 249(a)(1)(B)(i) 37

Statutes, regulations and rules—Continued: Page

18 U.S.C. 249(a)(2)(A)(ii)(I) 37
18 U.S.C. 351(b) 38
18 U.S.C. 351(d) 38
18 U.S.C. 670(b)(2)(C) 37
18 U.S.C. 844(d) 37
18 U.S.C. 844(i) 37
18 U.S.C. 924(c)(1)(A) 43
18 U.S.C. 924(c)(1)(A)(iii) 42, 43
18 U.S.C. 924(c)(5)(B) 38
18 U.S.C. 1028A(a)(1) 44
18 U.S.C. 1038(a)(1)(C) 38
18 U.S.C. 1038(a)(2)(C) 38
18 U.S.C. 1091(b)(1) 38
18 U.S.C. 1201(a) 38
18 U.S.C. 1203(a) 38
18 U.S.C. 1347(a) 37
18 U.S.C. 1365(a)(2) 38
18 U.S.C. 1366(d) 37
18 U.S.C. 1581(a) 37
18 U.S.C. 1583(b)(1) 37
18 U.S.C. 1584(a) 37
18 U.S.C. 1589(d) 37
18 U.S.C. 1590(a) 37
18 U.S.C. 1716(j)(3) 37
18 U.S.C. 1751(b) 38
18 U.S.C. 1751(d) 38
18 U.S.C. 1864(b)(1) 38
18 U.S.C. 1952(a)(B) 38
18 U.S.C. 1958(a) 38
18 U.S.C. 1992(a) 37

Statutes, regulations and rules—Continued: Page

18 U.S.C. 1992(b) 37
18 U.S.C. 2113(e) 38
18 U.S.C. 2115(a) 38
18 U.S.C. 2118(a) 38
18 U.S.C. 2118(b) 38
18 U.S.C. 2119(c) 38
18 U.S.C. 2237(b)(2)(B)(i) 37
18 U.S.C. 2251(e) 37
18 U.S.C. 2261(b)(1) 38
18 U.S.C. 2262(b)(1) 38
18 U.S.C. 2280(a)(1) 37
18 U.S.C. 2281(a)(1) 37
18 U.S.C. 2291(d) 37
18 U.S.C. 2332a(a) 38
18 U.S.C. 2332a(b) 38
18 U.S.C. 2332b(c)(1)(A) 37
18 U.S.C. 2332g(c)(3) 37
18 U.S.C. 2332h(c)(3) 37
18 U.S.C. 2339A(a) 38
18 U.S.C. 2339B(a)(1) 38
18 U.S.C. 2340A(a) 37
18 U.S.C. 2441(a) 38
18 U.S.C. 2442(b) 38
38 U.S.C. 1151 (1988 & Supp. V 1993) 36
42 U.S.C. 2272(b) 37
42 U.S.C. 2284(a) 38
42 U.S.C. 2284(b) 38
42 U.S.C. 3631 37

Statutes, regulations and rules—Continued: Page

49 U.S.C. 5124(a) 38
49 U.S.C. 46502(a)(2)(B) 38
49 U.S.C. 46502(b)(1)(B) 38
Ark. Code Ann. § 5-2-205:
(West 1987) 20
(West 2013) 22
La. Rev. Stat. Ann. § 14:30.1 (Supp. 2013) 46
Mont. Code Ann. (2011):
§ 45-2-103(2) 46
§ 45-5-102(1)(b) 46
Tenn. Code Ann. (West 2013):
§ 39-13-202(a)(2) 46
§ 39-13-202(b) 46
Va. Code Ann. § 18.2-33 (2009) 46
Wash. Rev. Code § 69.50.415(1) (2008) 29
21 C.F.R.:
Section 1308.11(d)(23) 5
Section 1308.12(b)(1)(xiii) 5
Section 1308.14(c)(1) 6
Section 1308.14(c)(10) 6
Fed. R. Crim. P. 29 ..... 9, 33
Sup. Ct. R.:
Rule 14.1(a) 41
Rule 14.1(h) 41

Miscellaneous:

Black's Law Dictionary (7th ed. 1999) 12
4 William Blackstone, *Commentaries on the Laws of England* (1769) 30, 44
Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* (2d ed. 1905) 21

Miscellaneous—Continued: Page

Phillip O. Coffin et al., *Opiates, Cocaine and Alcohol Combinations in Accidental Drug Overdose Deaths in New York City, 1990-98*, 98 Addiction 739 (2003) 28

Edward Coke, *The Third Part of the Institutes of the Laws of England* (Hein Co. 1986) (1644) 46

132 Cong. Rec. (1986):

p. 26,453 4

p. 27,161 ..... 4, 30

p. 32,728 35

p. 32,787 35

p. 33,158 35

Michael Dalton, *The Countrey Justice* (1655) 46

Joshua Dressler, *Understanding Criminal Law* (2d ed. 1995) 30

Final Report of the National Commission on Reform of Federal Criminal Laws (1971) 22

H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970) 3

Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59 (2005) 20, 27

Richard G. Jones, *Heroin's Hold on the Young*, N.Y. Times, Jan. 13, 2008 28

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 26

1 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) ..... *passim*

Model Penal Code (1985):

§ 2.03(1) 21

§ 2.03 cmt. 2 ..... 21, 24

Miscellaneous—Continued: Page

Nat'l Safety Council, *Prescription Nation*, http://www.nsc.org/safety_home/PrescriptionDrugOverdoses/Documents/RX-Overdose-Infographic-for-print.pdf (last visited Sept. 30, 2013) 5

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3d ed. 1982) 22, 23, 26

Random House Dictionary of the English Language (1987) 28

Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) 25, 26

Nina G. Shah et al., *Unintentional Drug Overdose Death Trends in New Mexico, USA, 1990-2005: Combinations of Heroin, Cocaine, Prescription Opioids and Alcohol*, 103 Addiction 126 (2007) 28

Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings* (Sept. 2011) 5

U.S. Atty's Off., *Ventura County Man Sentenced to 15 Years in Federal Prison for Selling "Magic Mushrooms" to Teenagers, One of Whom Was Killed After Running onto Freeway* (Aug. 3, 2009), http://www.justice.gov/usao/cac/Pressroom/pr2009/092.html 49

Webster's Third New International Dictionary (1986) 27, 35

Francis Wharton, *The Law of Homicide* (3d ed. 1907) 21, 26

Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735 (1985) 19, 22, 23, 27

In the Supreme Court of the United States

No. 12-7515

MARCUS ANDREW BURRAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 52-70) is reported at 687 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2012. A petition for rehearing was denied on September 13, 2012 (J.A. 26). The petition for a writ of certiorari was filed on November 27, 2012, and was granted on April 29, 2013, limited to questions one and two presented by the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on one count of distributing heroin and one count of distributing heroin whose use resulted in death,

both in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). J.A. 40-41. The district court sentenced him to concurrent terms of 240 months of imprisonment on each count. J.A. 42. The court of appeals affirmed. J.A. 52-70.

1. A provision of the Controlled Substances Act (CSA), 21 U.S.C. 841(a)(1), makes it "unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 841(b) in turn prescribes "[p]enalties" for violations of Section 841(a)(1) based on the type and quantity of the controlled substance, other offense characteristics, and the offender's criminal history. As relevant here, Section 841(b)(1)(C) provides that, "[i]n the case of a controlled substance in schedule I or II" of the CSA, an offender "shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life." The latter provision is often referred to as the "death results" provision, as are materially identical provisions in 21 U.S.C. 841(b)(1)(A)-(B) and 960(b)(1)-(3) that provide the same sentencing ranges (but nominally pertain to larger quantities of Schedule I and II controlled substances, or to international drug trafficking).

Heroin is in Schedule I, the most restrictive under the CSA. 21 U.S.C. 812(c), Schedule I(b)(10). Like all Schedule I substances, heroin "has a high potential for abuse," it "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for [its] use * * * under medical supervision." 21 U.S.C. 812(b)(1). Schedule II substances, such as cocaine (see 21 U.S.C. 812(c), Schedule II(a)(4)),

are also subject to the "death results" provision. They likewise have a high potential for abuse that "may lead to severe psychological or physical dependence," though they have currently accepted medical uses. 21 U.S.C. 812(b)(2).[1] Congress enacted the original Schedules and delegated authority to the Attorney General to add and reschedule controlled substances. See 21 U.S.C. 811-812.

The "death results" provision was not part of Congress's original enactment of the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. In particular, Section 401 of the CSA, now codified at 21 U.S.C. 841, made it a crime to distribute a controlled substance, and established penalties based on the type and quantity of the controlled substance involved and the offender's criminal history, but it prescribed no enhanced penalties relating to death or serious bodily injury. That was so even though Congress had enacted the law partly out of concern that "hard narcotics and opiates" were "providing serious addiction or abuse problems" "approaching epidemic proportions" and that "a leading cause of death among teenagers * * * in many major metropolitan areas [was] overdosage of heroin." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 4, 6 (1970).

By 1986, Members of Congress believed "the drug problem in America" remained a "crisis and a plague" even after passage of the CSA and that stronger penalties were warranted for traffickers in controlled sub-

---

[1] Schedule III controlled substances are also subject to an analogous "death results" provision, 21 U.S.C. 841(b)(1)(E)(i)-(ii), though its sentencing consequences are much less substantial than those of the Schedule I and II "death results" provisions. Schedule IV and V substances have no corresponding "death results" provision. See 21 U.S.C. 841(b)(2)-(3).

stances whose use resulted in death. 132 Cong. Rec. 26,453 (1986) (statement of Sen. Mattingly) (internal quotation marks omitted); see, *e.g.*, *ibid.* (noting the high-profile death of basketball star Len Bias from a drug overdose and the "national outcry" for efforts to prevent further drug-related deaths); *id.* at 27,161 (statement of Sen. DeConcini) (advocating "extremely stiff penalties" as a way to "send[] the clear message" that "we are no longer going to tolerate" "the insidious business of drug trafficking," especially where it results in "death or serious bodily harm"). Congress accordingly enacted the Anti-Drug Abuse Act of 1986, which established the "death results" provision. Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2. Although Congress has since amended Section 841(b)(1) numerous times, it has left the "death results" provision undisturbed.[2]

Today, overdoses of Schedule I and II substances—especially cocaine and opiates including heroin—remain a significant cause of death in the United States: According to the National Center for Injury Prevention and Control (one of the Centers for Disease Control and Prevention), from 1999 to 2010, at least 80,883 deaths in the United States resulted from overdoses involving illicit Schedule I or II controlled substances. The Center has also found that during that period, 125,895 deaths

---

[2] See Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, § 2, 110 Stat. 3807; Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, Div. E, § 2, 112 Stat. 2681-759; Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, § 3, 114 Stat. 9; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3005, 116 Stat. 1805; Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. No. 110-425, § 3, 122 Stat. 4828; Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2, 4, 124 Stat. 2372.

resulted from overdoses involving prescription opioids (many of which, even if obtained through legitimate prescriptions, would be Schedule II controlled substances). In 2010, 3036 overdose deaths involved heroin, which translates to approximately 1 death for every 118 users dependent on heroin that year.[3]

2. Petitioner sold heroin on multiple occasions—as relevant here, on April 14, 2010, to Joshua Banka. Banka was "a long-time, multiple drug user," but he had only begun using heroin in September 2009, and he had not used it for about six months (*i.e.*, since October 2009). J.A. 54, 96-97, 107, 121.

On the morning of April 14, Banka and his wife, Tammy Noragon Banka (Noragon), visited a friend's house, where they smoked marijuana (a Schedule I controlled substance). J.A. 115, 127-128; 21 C.F.R. 1308.11(d)(23). Banka also stole from the house some oxycodone pills (a Schedule II controlled substance). J.A. 117-118; 21 C.F.R. 1308.12(b)(1)(xiii). He and Noragon then went home, and at about 10 a.m., Banka crushed, prepared ("cooked"), and injected the oxycodone. J.A. 118-120. At about 2 p.m., Noragon drove Banka from their home in Nevada, Iowa, to meet up with petitioner in the parking lot of a grocery store in Ames, Iowa. Petitioner and Banka had met for the first time

---

[3] The findings as to heroin are published at Nat'l Safety Council, *Prescription Nation* 1 (citing 3036 overdose deaths involving heroin in 2010), http://www.nsc.org/safety_home/PrescriptionDrugOverdoses/Documents/RX-Overdose-Infographic-for-print.pdf (last visited Sept. 30, 2013); Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings* 83 (Sept. 2011) (reporting 359,000 users dependent on heroin). The remaining findings were communicated to this Office.

about a week earlier in a strip club and had since arranged for Banka to buy heroin. Per that arrangement, petitioner sold Banka one gram of heroin for $200. J.A. 98-104, 121.

The transaction took place in Banka and Noragon's car and lasted only a few minutes. Petitioner got out of the car, Noragon drove to a different parking lot about a block and a half away, and Banka immediately cooked and injected some of the heroin. He became groggy and fell asleep. Noragon waited "to make sure [Banka] was okay" and then drove him home, arriving between 4 and 5 p.m. With Noragon's help, Banka went to bed, awoke at around midnight, complained that he was in pain, and injected more heroin between midnight and 1 a.m. on April 15. Banka injected still more heroin at about 5 a.m., when Noragon went to sleep. J.A. 101-111.

Noragon awoke at about 10:30 a.m. on April 15 and found Banka's dead body seated on the toilet, slumped into the shower. She called 911. J.A. 111-112. Officers ultimately found several used and unused syringes in Banka and Noragon's bathroom and car, including a syringe that still contained some of the heroin that Banka had cooked. J.A. 82, 91-92; see Trial Tr. (Tr.) 210-211, 215. Officers also found 0.59 grams of heroin in powder form, along with tablets of alprazolam and clonazepam (benzodiazepines on CSA Schedule IV), baclofen, and oxycodone. Tr. 154-155, 207; 21 C.F.R. 1308.14(c)(1) and (10). Later, upon reviewing a photographic lineup, Noragon identified petitioner as the person who had sold Banka the heroin. Tr. 209-210.

3. A grand jury in the Southern District of Iowa charged petitioner in a superseding indictment with two counts: distributing heroin whose use resulted in death, based on the April 2010 sale to Banka; and distributing

heroin, based on an unrelated November 2009 sale to a confidential informant. Superseding Indictment 1-2. Petitioner pleaded not guilty, and the case proceeded to a jury trial. J.A. 8-12, 40.

a. At trial, during the government's case in chief, Noragon and local police officers testified to the facts described above. J.A. 75-135. Also, two medical experts testified about the circumstances of Banka's death. J.A. 136-209.

Dr. Eugene Schwilke, a forensic toxicologist, examined blood and urine samples taken from Banka's body. J.A. 188-191, 197; see J.A. 210-212 (toxicology report). His tests "detected multiple drugs, including morphine (a metabolite of heroin), 6-monacetylmorphine (a metabolite of heroin), codeine (a likely impurity in the heroin), 7-aminoclonazepam (a metabolite of clonazepam), alprazolam, marijuana metabolites, and oxycodone." J.A. 54 (footnote omitted); see J.A. 54 n.2 ("[A] metabolite is what a drug breaks down into in the body."); see also J.A. 191-193, 197-198.

Dr. Schwilke noted that the morphine, a heroin metabolite, was the only substance in Banka's system "that was excessive and above the therapeutic range." J.A. 194. He added that, because Banka had not used heroin between October 2009 and April 2010, the amount of morphine found in Banka's system, if it had been the result of a "single heroin administration," "would be expected to be highly toxic." J.A. 195-196. Dr. Schwilke explained that a regular heroin user's tolerance to heroin "dissipates rather quickly" when the user ceases regular use, and that Banka's tolerance "certainly" would have done so during the six months when he was not using heroin. *Ibid.*; see *ibid.* (testimony that the 201 nanograms of morphine per milliliter of Banka's blood "rep-

resent[ed] a dose that would exceed what would be tolerable for a nontolerant individual"). Dr. Schwilke explained that, by contrast, the concentration of oxycodone in Banka's blood was "consistent with a relatively low dose," such as "a single 5 to 10 milligram dose, and [would be] very typical of a person who's just starting out on oxycodone pain therapy." J.A. 204.

Dr. Schwilke also pointed out that the heroin could have had "a synergistic or overenhanced effect" when combined with the other drugs in Banka's system, most of which, like heroin, cause "respiratory and/or central nervous system depression." J.A. 193-196. Finally, although Dr. Schwilke could not say whether Banka would have survived if he had not taken the heroin—or, for that matter, whether Banka would have survived if he had not taken the oxycodone—Dr. Schwilke concluded that the heroin "was a contributing factor" in Banka's death. J.A. 199, 208.

Dr. Jerri McLemore, an Iowa state medical examiner, conducted Banka's autopsy. J.A. 138-139. Based on her examination and the toxicology report, she "certified the cause of death as a mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." J.A. 157; see J.A. 174-175, 181 (Dr. McLemore's report). Like Dr. Schwilke, she explained that "morphine, the breakdown product of the heroin, was the only drug that was above the therapeutic range" and that it was "at a significantly high level." J.A. 157, 153. Although she could not say whether Banka would have survived if he had not taken the heroin, J.A. 159, Dr. McLemore concluded that Banka's death would have been "[v]ery less likely" without the heroin, J.A. 171. See *ibid.* ("[W]ith the amount of heroin in his system, the morphine that was so elevated

as opposed to his other [drugs], it is more likely that he would not have died [absent the heroin]."). Accordingly, she concluded that her findings were "consistent with th[e] drugs, including the heroin, as contributing to death." J.A. 158. Dr. McLemore elaborated that, as she used the term, something that "contribut[es]" to a death is something "that aided in bringing about the death," and therefore "there may be a number of contributing factors" in a death. J.A. 159. Here, she concluded that the heroin "[wa]s the cause of [Banka's] death as a contributor," as were the oxycodone, the benzodiazepines, and "possibly" the marijuana. J.A. 159-160.

At the close of the government's evidence, petitioner moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on both counts of the indictment. J.A. 214-216. As to the count charging him with distributing heroin whose use resulted in death, petitioner argued (*inter alia*) that the government was required to prove that the heroin petitioner sold to Banka was a "but for" cause of Banka's death; he contended that the government's evidence was insufficient under that standard because "[b]oth medical witnesses * * * testified that they can't say that Mr. Banka wouldn't have died but for the heroin." J.A. 216. The district court summarily denied the motion. J.A. 217. Petitioner testified in his own defense and denied that he had sold any heroin to Banka. Tr. 363-369. He renewed his Rule 29 motion, which the court again denied. J.A. 220.

b. As to the count charging petitioner with distributing heroin whose use resulted in death, the government proposed instructions asking the jury to decide whether the government had proved that the heroin petitioner had sold to Banka was a "contributing cause" of Banka's death. J.A. 234. Petitioner proposed instead

instructions asking the jury to decide whether the government had proved that "the use of the heroin was the proximate cause of [Banka's] death." J.A. 236; see J.A. 237. Petitioner proposed to define "proximate cause" as:

> a cause of death that played a substantial part in bringing about the death. The death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.
>
> A cause may be a proximate cause of death, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the death.

J.A. 238.

The district court rejected petitioner's proposed instructions, because "proximate cause is not what the law is." J.A. 221-222. It instructed the jury that the government had to prove beyond a reasonable doubt that (1) petitioner intentionally distributed heroin; (2) at the time of the distribution, he knew that the substance was heroin; and (3) "[a] death resulted from the use of the heroin." J.A. 241. The court further instructed:

> For you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by [petitioner] was a contributing cause of Joshua Banka's death. A contributing cause is a factor that, although not the primary cause, played a part in the death.

J.A. 241-242. The court overruled petitioner's objection to the "contributing cause" portion of that instruction. J.A. 223-224.

The jury found petitioner guilty on both counts of the indictment. J.A. 8. Petitioner moved for a new trial, reiterating his instructional arguments. J.A. 247-252. The district court denied the motion. J.A. 29-34.

c. At sentencing, the district court calculated an advisory Sentencing Guidelines range of 360 months to life imprisonment. Sent. Tr. 14-15. The government sought a 360-month sentence. *Id.* at 11-13. While the court acknowledged that petitioner's conduct was among the "most serious" prosecuted in federal court (*id.* at 15), and that it resulted in "the untimely death of a very young person" (*ibid.*), it varied downward from the advisory range and imposed concurrent terms of 240 months of imprisonment on each count of conviction (*id.* at 16-18).

4. The court of appeals affirmed. J.A. 52-70. As relevant here, petitioner renewed his challenge to the jury instructions on the count charging him with distribution of heroin resulting in death. J.A. 57-60. He contended that the district court should have instructed the jury that, in order to find that Banka's death "result[ed]" from the heroin petitioner had sold him, the jury had to find that the use of the heroin was the proximate cause of the death. J.A. 57-58 & n.3. Relying on its prior decision in *United States* v. *McIntosh*, 236 F.3d 968 (8th Cir.), cert. denied, 532 U.S. 1022 (2001), the court of appeals rejected petitioner's claim. J.A. 58 (concluding that "a showing of 'proximate cause' is not required under [Section] 841(b)(1)"). The court noted that "[e]very circuit to address the issue agrees with *McIntosh* on this point." J.A. 58 n.4.

Petitioner also contended "that the district court erred by using 'contributing cause' language to define the statute's causation element." J.A. 59. The court of appeals rejected that argument as well, explaining that

the instruction was "consistent with this court's statement that [Section] 841(b)(1)'s 'results from' requirement is met by a 'contributing cause.'" *Ibid.* (quoting *United States* v. *Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), cert. denied, 546 U.S. 1116 (2006)). The court noted that in *Monnier*, it had "defined 'contributing cause' as '[a] factor that—though not the primary cause—plays a part in producing a result.'" *Ibid.* (quoting *Monnier*, 412 F.3d at 862, in turn quoting *Black's Law Dictionary* 212 (7th ed. 1999)). The court therefore held that the district court did not abuse its discretion in including substantially similar language in the instruction here. J.A. 60.

Relatedly, petitioner contended that the evidence was insufficient to show that Banka's death resulted from the heroin petitioner had sold him. J.A. 64-66. Petitioner relied on the evidence that Banka's death "'resulted from' a mixed drug intoxication, not the heroin," and that the government's medical experts "could not testify that Banka would not have died if he had not used the heroin." J.A. 65. The court concluded that the evidence was sufficient because "both doctors testified that the heroin was a 'contributing cause' of [Banka's] death, which satisfies the *Monnier* standard." *Ibid.* The court further pointed out that "the heroin metabolite [morphine] was the only drug present in levels above the therapeutic range" and that Dr. McLemore testified "that death without the heroin was 'very less likely.'" *Ibid.*[4]

---

[4] The court of appeals rejected petitioner's other contentions (J.A. 60-64, 67-70), which either were not renewed in this Court or were not within the limited scope of this Court's grant of review (see 133 S. Ct. 2049 (2013)).

SUMMARY OF ARGUMENT

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. 21 U.S.C. 841(b)(1)(C). That language plainly requires proof of causation. This case concerns the proper jury instructions on causation in a "death results" case where the victim died of an overdose of drugs that included heroin trafficked by the defendant. Causation in criminal law is generally analyzed under the headings of "cause in fact" and "proximate cause."

I. With respect to causation in fact, petitioner's jury was instructed that it could convict petitioner if it found that the heroin he trafficked was a "contributing cause" of Banka's death. That instruction was correct.

The concept of a "but for" cause—a condition in whose absence the result (such as death) would not have occurred—is often invoked in criminal law. But courts, commentators, and law reform commissions alike have long recognized that a but-for test is an unsound tool in certain circumstances, particularly when multiple forces coincide or combine to produce a given result. Alternative tests that rely on concepts such as a "substantial factor" or an "independently sufficient cause" are sometimes used instead of, or in tandem with, a but-for test. Yet they too can produce unsatisfactory or nonsensical results.

Instead, asking (as the jury was asked here) whether a particular act was a contributing cause of a given result is a sound and comprehensive test for causation in fact. Thus, judges grappling with issues of concurrent causation in criminal cases often address the question by asking whether the defendant's action "contributed" to the unlawful result. A "contributing cause" test makes par-

ticularly good sense under the "death results" provision because many drug-overdose deaths—such as Banka's death here—are paradigmatic cases of concurrent causation: drug users often use drugs in combination, and drugs in combination can be especially lethal. Accordingly, the instruction given to petitioner's jury accurately stated the law.

II. As for proximate cause, petitioner urges that the jury should have been separately instructed to decide whether Banka's death was a foreseeable result of petitioner's drug trafficking. Such an instruction was not warranted here, where a drug-overdose death was the only basis offered for conviction under the "death results" provision.

The text and structure of the CSA, as well as the context in which the "death results" provision was enacted, indicate that the primary concern of the "death results" provision is drug overdoses. Congress has embedded in the CSA its judgment that Schedule I and II substances are dangerous and prone to abuse—in other words, their use foreseeably risks death or injury to a user through their effect on the user's physiology. Accordingly, when a drug user's death by overdose is at issue, if the jury is properly instructed on causation in fact, no separate instruction on foreseeability is required. That is because proof of the circumstances themselves—*i.e.*, distribution of a designated dangerous drug, use of the drug, and the drug's contribution to the user's death by overdose—fully serves proximate cause's traditional function of limiting criminal responsibility to forms of injury about which Congress was concerned. Moreover, every court of appeals to consider the foreseeability question (invariably in the context of a drug overdose) has concluded the "death results" provision requires no separate instruc-

tion on foreseeability. Congress has acquiesced in that interpretation by leaving the "death results" provision undisturbed even as it has repeatedly amended 21 U.S.C. 841(b)(1).

As for petitioner's argument that a separate instruction on foreseeability is required because the "death results" provision contains a *mens rea* requirement, the premise is mistaken. No *mens rea* requirement attaches to the "death results" provision, just as no such requirement attaches to any of the other facts in 21 U.S.C. 841(b)(1). This Court has explained that although "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean* v. *United States*, 556 U.S. 568, 575 (2009). The "death results" provision falls in the latter category: under it, illegal-drug traffickers are punished for the deadly consequences suffered by users of the drugs they have trafficked. Accordingly, the district court in this case was correct to refuse petitioner's proposed jury instruction on foreseeability.

ARGUMENT

PETITIONER'S JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF THE "DEATH RESULTS" OFFENSE IN 21 U.S.C. 841(b)(1)(C)

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. 21 U.S.C. 841(b)(1)(C). The word "result" "plainly suggests causation." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012). Although the ultimate statutory requirement is proof that "death * * * results," criminal law generally analyzes questions of "causation" under the rubric of both "cause in fact" and

"'legal' or 'proximate' cause." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003) (LaFave). This case presents questions about both of those aspects of the causation inquiry, where the government seeks to hold a defendant drug trafficker criminally responsible for a drug-overdose death that "results from the use of [the controlled] substance" that the defendant trafficked. 21 U.S.C. 841(b)(1)(C).

The first question is whether evidence that a controlled substance was a "contributing cause" of the user's death by drug overdose is sufficient to establish that "the use of [the controlled] substance" was a cause in fact of the user's death. Courts and commentators grappling with questions of causation in situations where many concurrent factors produce a result—as is often the case with a drug overdose—generally agree that "contributing cause" is an appropriate standard for establishing causation in fact.

The second question is whether a separate showing of proximate cause (in petitioner's preferred formulation, foreseeability) is required under the "death results" provision. As this Court has explained, the term "proximate cause" is just a "label" for the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Petitioner is correct that in the criminal context generally, the proximate cause inquiry often entails asking whether "the result [of the defendant's conduct] was a foreseeable one." Pet. Br. 18; see *id.* at 18-21 & nn.10-11. But the structure of the CSA and the text of the "death results" provision signal that, once the jury finds that a user's drug-overdose death was caused in fact by use of a substance Congress has already concluded is foreseeably danger-

ous, no further finding of foreseeability is necessary. Accordingly, the district court's refusal to instruct the jury on foreseeability was sound.

I. As A Matter Of Causation In Fact, Death "Result[ed] From The Use" Of The Heroin Petitioner Distributed Because That Heroin Was A Contributing Cause Of The Victim's Death By Mixed-Drug Intoxication

Petitioner claims with respect to causation in fact that this Court "should reverse because the district court erred by submitting the contributing factor instruction." Pet. Br. 31; see *id.* at 16-18, 31-37. But in cases like this one, where the government presents evidence that a mixed-drug intoxication caused the victim's death (see J.A. 157, 174-175, 181), a "contributing cause" instruction is fully consistent with the "death results" provision's requirement of causation in fact.

A. Like many criminal laws, the "death results" provision does not require strict but-for causation

Petitioner asserts (Br. 12) that the phrase "'results from' * * * incorporates stringent 'but for' * * * standards of criminal law." Under that test, certain conduct is the cause in fact of a given result if "the result would not have happened in the absence of the conduct"; that is, "'but for' the antecedent conduct the result would not have occurred." LaFave § 6.4(b), at 467. As even the authorities petitioner relies on explain, however, criminal law does not insist on but-for causation in general. And particularly good reasons exist not to read such a limitation into the statute here, which is primarily concerned with drug overdoses. Rather, the appropriate test is one of contributing cause—the test on which petitioner's jury was instructed.

1. Criminal law generally does not insist on but-for causation

The keystone of petitioner's argument (and the content of the jury instruction he proposed) is that "[t]he common law has long required 'but for' causation as a minimum standard in criminal cases." Pet. Br. 16-17; see J.A. 238. That is incorrect. The but-for test is a practical and reliable guide to causation in many circumstances, but courts, commentators, and law reform commissions alike have long recognized that it is an unsound tool when multiple forces coincide or combine to produce a given result.

In a passage petitioner selectively quotes (Br. 14), Professor LaFave explains that for criminal liability to attach on the basis of "a specified result," "it must be determined that the defendant's conduct was the cause in fact of the result, which usually *(but not always)* means that but for the conduct the result would not have occurred." LaFave § 6.4, at 464 (emphasis added). Certainly, the but-for standard is in practice "almost always sufficient" for identifying and eliminating causes. *Id.* § 6.4(b), at 467.[5] But in "the unusual case—numerically in the minority, yet arising often enough to warrant considerable attention by the courts—" difficulty arises because applying the but-for test produces unsatisfactory or even nonsensical results. *Id.* § 6.4(a), at 467.

Professor LaFave gives an example: "*A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also

---

[5] For that reason, the government noted at the certiorari stage that the cause-in-fact inquiry in practice "is sometimes referred to as 'but-for causation.'" Br. in Opp. 16. Contrary to petitioner's claim (Br. 17), that observation does not reflect a concession "that at a minimum 'but for' causation is required" in this case.

inflicting such a wound; and *B* dies from the combined effects." LaFave § 6.4(b), at 468. Neither *A*'s conduct nor *X*'s is a but-for cause of *B*'s death. Or, suppose "*C* and *D* independently start separate fires, each of which would have been sufficient to destroy *P*'s house. The fires converge and together burn down the house. * * * Yet, application of the but-for test would result in a finding * * * that neither *C*'s nor *D*'s fire was a cause of the destruction of *P*'s house." Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1775-1776 (1985) (*Causation*). From a penological perspective, it would be unsatisfactory to exonerate the killers and arsonists in those examples. And it would defy common sense to assert that *B*'s death and the destruction of *P*'s house had no cause. Cf. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion) ("Events that are causally overdetermined * * * may not have any 'cause' at all [when the but-for test is used]. This cannot be so.").

In the face of such scenarios, courts have readily found criminal liability, often explicitly rejecting a but-for test because it would unaccountably exonerate obviously culpable defendants. For example, the California Supreme Court has explained that a "focus upon 'but for' causation * * * is misplaced" in a murder case in which the "defendant's acts * * * were a concurrent cause of the [victim's] death," because "it is no defense that the conduct of some other person contributed to the death." *People* v. *Jennings*, 237 P.3d 474, 496 (2010). Other States follow the same principle. See, *e.g.*, *Commonwealth* v. *Osachuk*, 681 N.E.2d 292, 294 (Mass. App. Ct.) ("When the conduct of two or more persons contributes concurrently to the death, the conduct of each is the proximate cause regardless of the extent to which each

contributes.") (citing *Commonwealth* v. *McLeod*, 477 N.E.2d 972, 985 n.21 (Mass.), cert. denied, 474 U.S. 919 (1985)), review denied, 691 N.E.2d 580 (Mass. 1997) (Table); *People* v. *Bailey*, 549 N.W.2d 325, 334 (Mich. 1996) ("In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause [and also satisfy any requirement of proximate causation]."); *Cox* v. *State*, 808 S.W.2d 306, 309 (Ark. 1991) ("[W]here there are concurrent causes of death, conduct which hastens or contributes to a person's death is a cause of death.") (discussing Ark. Code Ann. § 5-2-205 (West 1987)); *Holsemback* v. *State*, 443 So. 2d 1371, 1382 (Ala. Crim. App. 1983) (holding that co-defendants "could both be properly convicted of [the victim's] murder, even though they acted independently, if each inflicted an injury that caused, contributed to, or accelerated [the victim's] death"); see also LaFave § 6.4(b), at 468 n.14 (identifying States that address the "concurrent cause situation" by criminal statute).[6]

These approaches to causation are not recent innovations. For example, in *Wilson* v. *State*, 24 S.W. 409, 410 (Tex. Crim. App. 1893), the defendant "str[uck] [the victim] on the head with a large rock" at the same time as the defendant's brother, acting independently, "stab[bed] [the victim] with a knife, inflicting a mortal

---

[6] Moreover, as one scholar has explained, courts recognizing criminal responsibility for homicide when the defendant deprives the victim of a chance of survival implicitly reject the but-for test. See Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59, 66-109 (2005) (*Loss of a Chance*). The same is true of the common law's assignment of criminal responsibility for aiding and abetting, which generally does not require that the accomplice's aid or encouragement have been a but-for cause of the principal's commission of the offense. See *id.* at 110-116.

wound." The court explained that even though the defendant was not responsible for the concededly mortal knife wound inflicted by his brother, "if the blow with the rock contributed materially to the death of [the victim], [the defendant] also would be responsible" for homicide. *Ibid.* Likewise, *People* v. *Lewis*, 57 P. 470, 473 (Cal. 1899), explained that if the defendant wounds the victim while the victim "is dying from a wound given by another, both may properly be said to have contributed to his death." Thus, more than a century ago, treatises concluded that "[t]wo persons acting independently may contribute to the death of another, so that each will be guilty of the homicide." Francis Wharton, *The Law of Homicide* § 44, at 54 (3d ed. 1907) (Wharton) (citing *Lewis, supra*); see Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* § 237(g)(1), at 323 (2d ed. 1905) ("[If a defendant's] act or omission is *a cause* of the death of another, he is not relieved from responsibility for the homicide by the fact that the unlawful act or omission of a third person also contributed to cause the death, or would itself have caused the death.").

In the modern era, criminal law reform efforts have agreed that criminal liability should not invariably be gauged by a strict but-for test. Petitioner points out (Br. 17) that the Model Penal Code provides that "[c]onduct is the cause of a result when * * * it is an antecedent but for which the result in question would not have occurred." Model Penal Code § 2.03(1) (1985). But he fails to acknowledge the commentary to that section, which offers a variation of Professor LaFave's homicide-by-independent-assailants hypothetical, and emphasizes that "[a]ll who have considered the issue agree that each of the assailants should be liable, and it was the intent of the [drafters] to make them liable." *Id.* cmt. 2, at 259.

The commentary explains that in such "infrequent[]" cases, the criminal "result should be characterized as 'death from two mortal blows,'" such that "the victim's demise has as but-for causes each assailant's blow." *Ibid.* The Brown Commission's report on reform of federal criminal law proposed a "modified 'but for' test"; on its approach, the relevant question is whether the defendant's conduct was among a *combination* of factors that was a but-for cause of the result—not whether the defendant's conduct standing alone was a but-for cause. See *Final Report of the National Commission on Reform of Federal Criminal Laws* § 305 & cmt., at 31-32 (1971) (*Brown Commission Report*) ("Causation may be found where the result would not have occurred but for the conduct of the accused operating * * * concurrently with another cause[.]").[7]

2. "Contributing cause" is the appropriate test for causation in fact

As the discussion above suggests, the inadequacy of a but-for test has prompted efforts to adopt supplemental tests for atypical situations or formulate an all-encompassing test for causation in fact. See, *e.g.*, *Causation*, 73 Calif. L. Rev. at 1774-1813 (critiquing various

---

[7] The Brown Commission proposal went on to add an exception from liability in cases in which "the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient." *Brown Commission Report* § 305, at 31. Some States have adopted that approach by statute. See, *e.g.*, Ark. Code Ann. § 5-2-205 (West 2013). That exception is, however, in the nature of a proximate cause requirement because it reflects a policy judgment that the defendant's conduct, though a cause in fact of the result, is too insubstantial to impose criminal responsibility. See Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 779-780 (3d ed. 1982) (Perkins & Boyce).

proposed tests). Of those efforts, a test of contributing cause is a particularly sound formulation with judicial support.

a. Petitioner and some courts and commentators have urged or adopted a "substantial factor" test for causation. See Pet. Br. 17 & n.9 (citing cases and LaFave § 6.4(b), at 468-469). Courts and commentators use the term "substantial factor" to mean a variety of different (and not always consistent) things, some of which do not even concern causation in fact. For example, as sometimes used in the criminal context, that test addresses "factors" (*i.e.*, causes in fact) that are judged too insubstantial to warrant the attachment of criminal responsibility; on that understanding, the "substantial factor" formulation embodies a legal judgment in the nature of proximate cause. See Perkins & Boyce 779-780; *Causation*, 73 Calif. L. Rev. at 1781-1784.

In petitioner's usage, however, the "substantial factor" test addresses causation in fact. But its precise content is unclear and has, indeed, shifted during this very case. At trial, J.A. 238, petitioner asked the court to instruct the jury that an act is a cause of death only if it "played a substantial part in bringing about the death * * * and except for the cause the death would not have occurred"—which would have required the jury to apply the but-for test. In the court of appeals, Pet. C.A. Br. 25-26, petitioner did not advocate any "substantial factor" test as such, and instead argued that "if [Banka] would have died even without using the heroin," then the heroin did not "'contribute[] to' the death beyond a reasonable doubt"—which again asked the court to adopt the but-for test. In this Court, Pet. Br. 18, petitioner describes the "substantial factor" test as requiring a showing that "the defendant's actions would have *inde-*

pendently caused the death"—a test that would rule out even many but-for causes (such as two wounds, each survivable on its own, but lethal in combination).

b. Petitioner's latest suggestion (Br. 18) is that causation in fact is established when the defendant's conduct would have been "independently sufficient" to bring about the unlawful result. Some commentators have similarly voiced such an approach, at least as an adjunct to a but-for test. See LaFave § 6.4(b) at 468 (criticizing the but-for test using a hypothetical involving "two causes, each alone sufficient to bring about the harmful result"); see also Model Penal Code § 2.03 cmt. 2, at 259 (asserting that the "only difficult case" arises "when the conduct of two actors is completely independent, and each actor's conduct would have been sufficient by itself to produce death"). But that approach unduly limits criminal responsibility in ways that no commentator has explicitly endorsed and that cannot be reconciled with sound policy.

The problems with an independently-sufficient test are most apparent when more than two bad actors are involved. For example, suppose that *A*, *B*, and *C* each independently puts one drop of poison in *V*'s coffee intending to kill *V*; that *V*'s strong constitution makes a full two drops of poison a lethal dose; and that *V* indeed dies from poisoning. Petitioner's approach would conclude that *V*'s death did not result from *A*'s conduct (nor from *B*'s, nor from *C*'s): No single drop of poison was a but-for cause of *V*'s death, because the other two drops would have been enough to kill *V*. And no actor's conduct was independently sufficient to cause *V*'s death, because two drops, not just one, were needed to kill him. "[I]n other words, [*V*'s death] may not have any 'cause'

at all. This cannot be so." *Price Waterhouse*, 490 U.S. at 241 (plurality opinion).[8]

c. Instead, asking whether a particular act was a contributing cause of a given result is a sound, accepted, and comprehensive test for causation in fact. That test naturally describes the hypotheticals above: The simultaneous wounds inflicted by the murder victim's assailants were both contributing causes of the victim's death. The arsonists' fires were both contributing causes of the house's destruction. And each drop of poison contributed to the victim's death.

For that reason, judges grappling with issues of concurrent causation in criminal cases often address the question by asking whether the defendant's action "contributed" to the unlawful result. See, *e.g.*, *State* v. *Christman*, 249 P.3d 680, 687 (Wash. Ct. App.) (under the causation in fact "test [that] is generally applied in multiple causation cases," "all parties whose actions contributed to the outcome are held liable"), review denied, 257 P.3d 666 (Wash. 2011) (Table); *Jennings*, 237 P.3d at 496 (approving criminal responsibility "[w]hen the conduct of two or more persons contributes concurrently" to the unlawful result) (citation and emphasis omitted); *Osachuk*, 681 N.E.2d at 294 (same); *Bailey*, 549 N.W.2d at 334 (describing the causation in fact inquiry as wheth-

---

[8] Moreover, even in simpler cases, an independently-sufficient test is imprecise because "few if any acts are sufficient by themselves to produce any particular consequence." *Causation*, 73 Calif. L. Rev. at 1776. For example, in the concurrent-arson hypothetical (p. 19, *supra*), neither arsonist's conduct in setting a fire was independently sufficient to destroy the house; it was also necessary that combustible material exist near the house and that oxygen be present in the air. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt. c (2010) (Restatement).

er the defendant was "a contributory cause"); *Cox*, 808 S.W.2d at 309 ("[C]onduct which * * * contributes to a person's death is a cause of death."); *Holsemback*, 443 So. 2d at 1382 ("[The two defendants] could both be properly convicted of [the victim's] murder, even though they acted independently, if each inflicted an injury that caused, contributed to, or accelerated [the victim's] death."); *Lewis*, 57 P. at 473 (identifying circumstances in which two independent assailants "may properly be said to have contributed to [the victim's] death").

Commentators on criminal law likewise have addressed the problem of concurrent causes in fact through the concept of contributing cause. Wharton § 44, at 54 ("Two persons acting independently may contribute to the death of another, so that each will be guilty of the homicide."); Perkins & Boyce 771 ("All antecedents which contribute to a given result are, as a matter of fact, the causes of that result."). And the government has recently explained how the concept of aggregate causation—which recognizes that a result is ultimately caused by the aggregation of all factors contributing to it—is a superior approach for addressing questions of causation in the criminal restitution context. U.S. Br. at 19-27, *Paroline* v. *United States*, cert. granted, No. 12-8561 (June 27, 2013).[9]

---

[9] With considerable variation in phrasing, the essence of the contributing-cause approach has also gained acceptance among commentators on tort law. See, *e.g.*, Restatement § 27 cmt. f & illus. 3 ("Multiple sufficient causal sets") (offering a hypothetical in which three people negligently lean on a car, rolling it off a mountain; all three are causes in fact of the car's destruction, even if the force of any two would have been sufficient to propel the car); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is

3. The "death results" provision in particular is satisfied by a showing that use of the controlled substance contributed to the victim's death

The "death results" provision establishes an enhanced sentencing range if death "results from the use of [the controlled] substance" trafficked by the defendant. The government therefore must prove that the use of the drug was a cause in fact of the victim's death. In applying that test, the text and context of the "death results" provision favor a contributing-cause test, particularly in cases involving a drug-overdose death.

a. The text of the "death results" provision does not limit its reach by specifying a particular test for causation in fact. Nor do definitions of "result" contain such a limitation. See, *e.g.*, *Webster's Third New Interna-*

---

a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event."); see also *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1239-1244 (10th Cir. 2009). Few courts or commentators, however, have found it important to establish a formal logical test for identifying contributing causes in the criminal context. But see *Loss of a Chance*, 91 Iowa L. Rev. 59.

In one persuasive formulation that has influenced the debate among legal philosophers, the "test of causal contribution" concludes that a particular condition was a cause in fact of a consequence "if [the condition] was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence." *Causation*, 73 Calif. L. Rev. at 1790 (emphasis omitted). Thus, in the two-arsonists hypothetical, an individual arsonist's act of starting a fire was a necessary part of a larger set of conditions—the presence of combustible material, atmospheric oxygen, etc.—that together was sufficient to destroy the house. Cf. note 8, *supra*. And in the poisoning hypothetical, pp. 24-25, *supra*, any one drop of poison was a necessary part of a larger set of conditions—the presence of exactly one more drop of poison—that together was sufficient to kill the victim.

tional Dictionary 1937 (1986) (*Webster's Third*) (defining "result" as "to proceed, spring, or arise as a consequence, effect, or conclusion"). Nothing about such definitions suggests that a result can arise only from necessary (*i.e.*, but-for) causes, or can arise only from some independently sufficient cause. Most importantly, nothing about the definition of "result" rules out the commonsense idea that results may sometimes proceed from the contributions of many causes in the aggregate. See, *e.g.*, *Random House Dictionary of the English Language* 1642 (1987) (defining "result" as "to spring, arise, or proceed as a consequence of actions, circumstances, premises, etc."). The text of the statute is thus fully compatible with criminal law's acceptance of the concept of contributing cause.

b. The context in which the "death results" provision is applied—typically, death by drug overdose—gives particular reason to think Congress intended a contributing-cause test. Drug users often administer drugs in combination, as Banka did in this case (J.A. 54, 191-193, 197-198), in part because some drug combinations can have a "synergistic" effect, as Dr. Schwilke testified (J.A. 195). And the lethality of drugs in combination is well-studied and widely recognized.[10] Thus,

---

[10] See, *e.g.*, Richard G. Jones, *Heroin's Hold on the Young*, N.Y. Times, Jan. 13, 2008, at LI14 ("[S]tatistics show that heroin used in combination with other drugs proves far more lethal than heroin alone."); Nina G. Shah et al., *Unintentional Drug Overdose Death Trends in New Mexico, USA, 1990-2005: Combinations of Heroin, Cocaine, Prescription Opioids and Alcohol*, 103 Addiction 127, 133 (2007) (finding combination drug deaths varied from 89% to 98% of the annual totals of overdose deaths); Phillip O. Coffin et al., *Opiates, Cocaine and Alcohol Combinations in Accidental Drug Overdose Deaths in New York City, 1990-98*, 98 Addiction 739, 739

many overdose deaths—like Banka's death here—involve more than one drug. According to findings communicated to this Office by the National Center for Injury Prevention and Control, at least 46% of overdose deaths in 2010 involved more than one class of drugs. As for heroin in particular, most overdose deaths involving heroin also involved at least one other drug, and 1 in 4 deaths involving heroin also involved at least *two* other drugs.

Given the prevalence of mixed-drug overdoses, it would be anomalous to conclude that the "death results" provision is unconcerned with such deaths when no single drug was a but-for or independently-sufficient cause of the death. Such overdoses are all-too-real instances of the poisoning hypothetical used above to illustrate the inadequacies of the but-for and independently-sufficient tests for causation in fact. Consider the case of a victim who dies from use of (for example) heroin, oxycodone, and morphine. If it takes any pair of drugs to make a lethal dose, then it follows that no drug was a but-for cause of the death, and no drug would have been independently sufficient to cause death. On those facts, petitioner would urge this Court to hold that no one may be held responsible for the victim's death. By contrast, a test of contributing cause appropriately recognizes that each drug contributed to the victim's death, and each was therefore a cause of the death.

At least one state appellate court has approved this approach under a state controlled-substances homicide law that closely parallels the federal "death results" provision, Wash. Rev. Code § 69.50.415(1) (2008). In *Christman* the victim died from an overdose of three

---

(2003) ("Simultaneous use of multiple drugs has been shown to contribute substantially to overdose mortality.").

drugs—methadone (supplied by the defendant), methamphetamine, and alcohol. The medical examiner testified to his scientific opinion "that all three combined to cause death, and that each one * * * played a role. * * * So the alcohol hastened his death, the methamphetamine hastened his death, and the Methadone hastened his death. So each of them is a cause of death." *Christman*, 249 P.3d at 683. The state court rejected the defendant's claim that this evidence was insufficient to convict him of drug distribution "result[ing] in death," explaining (in part) that causation in fact was established as to "all parties whose actions contributed to the outcome." *Id.* at 687.

c. Petitioner urges that a contributing-cause test should be confined to civil cases because "the consequences of a determination of guilt," in comparison with civil liability, "are more drastic." Pet. Br. 34 (quoting LaFave § 6.4(c), at 472). Of course, Congress well knew that it was enacting "extremely stiff penalties" in the "death results" provision. 132 Cong. Rec. at 27,161 (statement of Sen. DeConcini). And the causation in fact inquiry does not fundamentally vary between the civil and criminal contexts. See, *e.g.*, *Christman*, 249 P.3d at 687 ("With respect to cause in fact, tort and criminal situations are exactly alike."); Joshua Dressler, *Understanding Criminal Law* § 14.01[B], at 160 (2d ed. 1995) ("The role of [factual] causality in the criminal law is the same as it is in the evaluation of any everyday event: to determine why something occurred.").

The causation questions here concern petitioner's criminal responsibility for harm resulting from his "antecedently * * * unlawful" drug trafficking. *Dean* v. *United States*, 556 U.S. 568, 576 (2009) (quoting 4 William Blackstone, *Commentaries on the Laws of England*

26-27 (1769) (Blackstone)). In that setting, there is every reason to conclude that Congress intended familiar, workable background rules of causation in fact to govern. Nothing suggests Congress required heightened causation showings that would exonerate drug traffickers of the predictable consequences that users suffer from their drugs often consumed in combination—especially, as in the case of heroin, drugs that lack accepted medical use and pose inherent dangers. See 21 U.S.C. 812(b)(1).

The reliance of petitioner and his amici on the rule of lenity (*e.g.*, Pet. Br. 32) is misplaced for similar reasons. As an initial matter, "[t]o invoke the rule, [this Court] must conclude that there is a grievous ambiguity or uncertainty in the statute." *Dean*, 556 U.S. at 577 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998)). But no ambiguity exists here—or in any of the statutes under which courts have described the causation in fact inquiry as contributing cause. See pp. 25-26, *supra*. Moreover, adopting a constrained test for causation in fact would not serve the rule of lenity's purpose of "ensur[ing] fair warning" to the defendant that his conduct is criminal. *Reynolds* v. *United States*, 132 S. Ct. 975, 982 (2012) (quoting *United States* v. *Lanier*, 520 U.S. 259, 266 (1997)). Any defendant subject to punishment under Section 841(b) has necessarily satisfied all prerequisites for criminal responsibility under Section 841(a), a sufficient assurance of fair warning. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3 (1994).

B. Petitioner was properly convicted under the "death results" provision

1. Petitioner previously suggested (see Pet. 15-16) that the district court in this case could have avoided any claim of instructional error simply by instructing the

jury using the language of the "death results" provision "without embellishment" (J.A. 60). See *United States* v. *Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010) ("the statutory language" is "clear enough"); cf. *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (approving a causation instruction that "use[d] the everyday words contained in [the statute] itself"). That is correct, but the district court had discretion to offer petitioner's jury additional guidance on the statutory standard. As explained above, the contributing-cause instruction given to petitioner's jury accurately stated the law.

The evidence at trial supported the instruction given: the government had shown (and petitioner does not dispute) that a "mixed drug intoxication"—that is, an overdose—was a but-for cause of Banka's death. J.A. 157, 174-175, 181. That mixture involved multiple drugs that all had a tendency (especially in combination) to depress Banka's respiratory and central nervous systems. J.A. 193-196. Applying medical and scientific expertise, and with the benefit of a full opportunity to examine Banka's body and fluids, Drs. Schwilke and McLemore could not identify any one drug as a but-for cause of Banka's death, nor did they identify any one drug as independently sufficient to cause Banka's death. See J.A. 159, 169-171, 208. That aligned the facts here with those in the poisoning hypothetical above. See pp. 24-25, 28-29, *supra*. Reinforcing that understanding, Drs. Schwilke and McLemore expressly testified that heroin was a contributing cause of Banka's death. J.A. 158-160, 199. Moreover, the experts' testimony established that the heroin's contribution was important: the heroin's metabolites were far above the therapeutic range, at a level "expected to be highly toxic" (J.A. 153, 157, 194-196); by contrast, Banka's blood chemistry suggested he had "not

[taken] an excessive dose" of oxycodone (J.A. 203-204, 208). Thus, Dr. McLemore concluded that Banka's death would have been "[v]ery less likely" had he not injected petitioner's heroin. J.A. 171.

2. If this Court were to reject the district court's contributing-cause instruction, the appropriate disposition of the case would depend on the standard the Court adopts. For example, if the Court were to conclude that the government was required to prove that Banka would not have died but for his heroin use, then the appropriate disposition—in light of petitioner's Rule 29 motion (J.A. 214-216, 220) and the absence of evidence that Banka would have lived but for his heroin use (J.A. 159, 169-171, 208)—would be to vacate petitioner's conviction on the charge of distribution resulting in death, and remand for entry of judgment on the lesser included offense of simple distribution of heroin. See, *e.g.*, *United States* v. *Plenty Arrows*, 946 F.2d 62, 66-67 (8th Cir. 1991). But this Court's adoption of some other test for causation in fact might require closer analysis of the record. The court of appeals would be best positioned to apply this Court's decision to the facts of this case in the first instance.

II. Once The Government Establishes That A Controlled Substance Was A Cause In Fact Of A Drug-Overdose Death, The "Death Results" Provision Does Not Require A Separate Jury Instruction On Foreseeability

Petitioner urges (Br. 18-29), under the heading of "proximate cause," that the "death results" provision requires a separate instruction and proof that the victim's death was a reasonably foreseeable result of the defendant's drug-trafficking offense. The court below held to the contrary, as has every other court of appeals to consider the question where a drug overdose is the

only basis offered for conviction under the "death results" provision. In those circumstances, the text of the "death results" provision, the structure of the CSA, and Congress's acquiescence in the courts of appeals' uniform interpretation of the "death results" provision all indicate that, when the jury is properly instructed on causation in fact, no separate instruction on foreseeability is required. Proof of the circumstances themselves—*i.e.*, distribution of a designated dangerous drug, use of the drug, and the drug's contribution to the user's death by overdose—fully serves the traditional function of proximate cause. The district court was therefore correct to refuse petitioner's proposed jury instruction, and the government's proof was sufficient to satisfy the statute under any reasonable test.

A. The "death results" provision does not require a separate instruction on foreseeability in a drug-overdose case

Petitioner contends that this Court should read a foreseeability requirement into the "death results" provision because "the common law * * * requires the prosecution to prove * * * that the result [for which a defendant is held criminally responsible] was a foreseeable one." Pet. Br. 18. The Court should reject that invitation here because the text and structure of the statute indicate otherwise in a case involving a drug-overdose death.

1. As an initial matter, no reference to "foreseeability" or "proximate cause" appears in the text of the "death results" provision. That omission is not insignificant in the context of the CSA: Congress considered expressly addressing the foreseeability of a victim's death in another sentence-enhancing provision of the same 1986 law that enacted the "death results" provision, and Congress actually added such a provision elsewhere

in the CSA in 1988.[11] That history shows that the 1986 Congress that enacted the "death results" provision "understood how to place a reasonable foreseeability requirement into a sentencing enhancement provision," but did not do so in the "death results" provision. *United States* v. *Patterson*, 38 F.3d 139, 145 n.7 (4th Cir. 1994), cert. denied, 514 U.S. 1113 (1995).

Petitioner's textual focus on the meaning of "result" (Br. 13) also does not establish the need for a foreseeability instruction. Dictionary definitions of "result" say nothing about foreseeability. See, *e.g.*, *Webster's Third* 1937 (to "result" is "to proceed, spring, or arise as a consequence, effect, or conclusion"). The primary case of this Court on which petitioner relies (Br. 13) does not

---

[11] In particular, as part of negotiations between the Senate and House over the bill amending the CSA that was eventually enacted as the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, the House adopted an amendment authorizing the death penalty for continuing criminal enterprise drug offenses that cause death. 132 Cong. Rec. at 32,728 (text of H. Con. Res. 415); see *id.* at 33,158. The House amendment identified, as a mitigating factor for the jury to consider in its penalty-phase deliberations, whether "[t]he defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense resulting in death * * * would cause, or would create a grave risk of causing, death to any person." *Id.* at 32,787 (Section 1995(k)(5)).

Although that amendment did not survive in the final 1986 legislation, Congress added a similar death-penalty provision to the CSA two years later in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387 (amending 21 U.S.C. 848). Under that provision, the jury was to consider as a mitigating factor whether "[t]he defendant could not reasonably have foreseen that the defendant's conduct in the course of the * * * offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person." 21 U.S.C. 848(m)(4) (1988) (repealed 2006).

suggest otherwise. In *Brown* v. *Gardner*, 513 U.S. 115 (1994), this Court held that 38 U.S.C. 1151 (1988 & Supp. V 1993)—which then provided that the Department of Veterans Affairs (VA) would compensate for an injury occurring "as the result of hospitalization, medical or surgical treatment" provided under VA programs—did not require a showing of VA fault. 513 U.S. at 116-117; see *id.* at 117 (noting "the absence from the statutory language of so much as a word about fault on the part of the VA"). The government argued that "as a result of" in the statute "signifie[d] a proximate cause requirement that incorporates a fault test." *Id.* at 119. The Court rejected that argument, explaining that "result" "is naturally read simply to impose the requirement of a causal connection." *Ibid.* Only in the alternative did the *Gardner* Court observe that, "[a]ssuming" a requirement of proximate cause, that would still not support "requiring a demonstration of fault." *Ibid.* Contrary to petitioner's claim, the Court's "assum[ption]" for the sake of illustrating the insufficiency of the government's argument in *Gardner* is no authority for construing "result" here.[12]

2. Petitioner must instead draw his proposed foreseeability requirement from background principles of the common law. But the conclusion petitioner would draw from those principles—that an instruction on fore-

---

[12] The only other case of this Court on which petitioner relies (Br. 15) for the meaning of "results," *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995), is unhelpful because the provisions at issue there did not even use the word "result." See *id.* at 690-691 (quoting pertinent statutes and regulations). And background assumptions about "ordinary requirements of proximate causation and foreseeability," *id.* at 696 n.9, are displaced in the present context by unique features of the CSA, see pp. 37-41, *infra*.

seeability is required in every criminal case—fails to account for the structure of the CSA and an unusual feature of the "death results" provision. Most statutes assigning criminal responsibility for a death speak generically about the link between offense conduct and the resulting death (thus potentially inviting presumed adoption of an implied foreseeability requirement). But the "death results" provision insists specifically that the death "result *from the use* of [the trafficked controlled] substance," 21 U.S.C. 841(b)(1)(C) (emphasis added). Thus, the provision is concerned not with drug *trafficking* deaths generally, but with deaths associated with drug *use* specifically—primarily, overdoses. In a prototype drug-overdose case, because Congress has already made a judgment about the dangers of overdoses of scheduled controlled substances, the statutory "death * * * results" element is satisfied when the jury finds that a drug-overdose death was in fact caused by use of the controlled substance trafficked by the defendant.

a. The "death results" provision is nearly unique among the scores of federal criminal laws specifying increased punishment when a death results. The vast majority of such statutes generically provide that the death must result from "the offense" or a "violation" of the statute,[13] or from "the acts committed" or "conduct prohibited" or "crime prohibited,"[14] or they simply make implicit reference to the offense conduct as the cause of

---

[13] 8 U.S.C. 1324(a)(1)(B)(iv); 18 U.S.C. 43(b)(1), 175c(c)(3), 249(a)(1)(B)(i), (a)(2)(A)(ii)(I), 670(b)(2)(C), 1347(a), 1366(d), 1581(a), 1583(b)(1), 1584(a), 1589(d), 1590(a), 1992(a), (b), 2237(b)(2)(B)(i), 2332g(c)(3), 2332h(c)(3); 42 U.S.C. 2272(b).

[14] 18 U.S.C. 34, 37(a), 241, 242, 245(b), 247(d)(1), 844(d), (i), 1716(j)(3), 2280(a)(1), 2281(a)(1), 2291(d), 2332b(c)(1)(A), 2340A(a); 42 U.S.C. 3631; cf. 18 U.S.C. 2251(e).

the death.[15] Very few statutes outside the CSA state an explicit test for deciding whether offense conduct and a "result[ing]" death are sufficiently linked to justify criminal responsibility for the death.[16]

b. Because of its atypical approach, the "death results" provision's compass differs substantially from that of a hypothetical statute assigning criminal responsibility for any death foreseeably resulting from a drug-trafficking offense. In important respects, the "death results" provision assigns criminal responsibility more narrowly. For example, a deadly explosion at an illegal drug lab, or a killing during a disagreement over a drug deal, may well be a foreseeable result of a drug-trafficking offense under 21 U.S.C. 841(a). But those are no basis for a conviction under the "death results" provision because such deaths do not "result[] from the use" of the trafficked substance. In other respects, the "death results" provision may assign criminal responsibility more broadly. For example, a *particular* heroin user's death may not be a foreseeable result of a distant opium-poppy farmer's heroin manufacturing. But the "death results" provision clearly assigns criminal responsibility for the death to the drug manufacturer in that case.

---

[15] 10 U.S.C. 881(b), 950t(2), (7), (8), (9), (11)(A), (12), (13)(A), (14), (17), (23), (24), (29); 18 U.S.C. 38(b)(3), 248(b), 351(b), (d), 1038(a)(1)(C), (a)(2)(C), 1091(b)(1), 1201(a), 1203(a), 1365(a)(2), 1751(b), (d), 1864(b)(1), 1952(a)(B), 1958(a), 2113(e), 2115(a), 2118(a), (b), 2119(3), 2261(b)(1), 2262(b)(1), 2332a(a), (b), 2339A(a), 2339B(a)(1), 2441(a), 2442(b); 42 U.S.C. 2284(a), (b); 49 U.S.C. 46502(a)(2)(B), (b)(1)(B); cf. 18 U.S.C. 924(c)(5)(B).

[16] Only two appear to exist: 18 U.S.C. 38(b)(3) (relating to fraud involving aircraft or space vehicle parts) and 49 U.S.C. 5124(a) (relating to violations of hazardous materials laws, regulations, and orders).

Those boundaries that Congress drew demonstrate that the primary concern of the "death results" provision, conceived as a response to a wave of drug overdoses (see pp. 3-4, *supra*), is indeed drug overdoses. And the provision particularly assigns criminal responsibility to the people who trafficked in the controlled substances at issue. In a case about an overdose, those limitations fully serve the traditional function of proximate cause. As petitioner recognizes (Br. 14, 20, 31), the common law proximate cause requirement of foreseeability ensures that "any variation between" the defendant's offense "and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." LaFave § 6.4, at 464. Thus, when the matter is left unstated by Congress, courts typically "look to * * * the relationship of the [resulting] injury * * * with those forms of injury about which Congress was likely to have been concerned in making [the] defendant's conduct unlawful." *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 478 (1982). Here, drug-overdose deaths are the very "form[] of injury about which Congress was likely to have been concerned," *ibid.*

Stated otherwise, Congress elected to treat drug-overdose deaths caused in fact by controlled substances as per se foreseeable to the criminals who traffic those dangerous substances. That approach is empirically well supported. It is foreseeable that a drug user who obtains a controlled substance will use it. See, *e.g.*, *United States* v. *Martinez*, 588 F.3d 301, 321 (6th Cir. 2009) ("[A]n intervening act" of drug use does not break the chain of proximate causation because it "may be said to be a response to the prior actions of the defendant when it involves reaction to the conditions created by the defendant.") (quoting LaFave § 6.4(f)(3), at 482), cert. denied,

131 S. Ct. 538 (2010). It is also foreseeable that a drug user will overdose; Schedule I and II controlled substances are controlled precisely because they are poisonous and prone to abuse, and their lethality—particularly in combination with other drugs—is well-known. See pp. 2-3, 28-29 & note 10, *supra*.

Congress's rejection of a case-specific foreseeability inquiry for overdoses was eminently sensible. Petitioner does not say what evidence he would offer at trial to dispute the obvious dangers of heroin and persuade the jury that a drug-overdose death was unforeseeable to him as a drug trafficker. Presumably, he would argue that his drug distribution was somehow not dangerous, or Banka was by all appearances a responsible heroin user. Cf. Pet. Br. 30-31. But having categorically concluded otherwise, Congress understandably did not wish trials in "death results" cases to become jury referenda on the defendant drug dealer's plea that he had a practice of tutoring his clientele on the fine points of "safe" use of illegal drugs, or that he only dispensed "safe" doses of heroin. "In short, Congress recognized that the risk is inherent in the product and thus it provided that persons who distribute it do so at their peril." *United States* v. *Robinson*, 167 F.3d 824, 831 (3d Cir.), cert. denied, 528 U.S. 846 (1999).

c. In practice, the government will typically present evidence that the defendant trafficked in a controlled substance and that the victim's use of the substance was a cause in fact of the victim's death by overdose. If the jury finds those facts (as all agree it must to convict), no legal basis exists for the jury to conclude that the victim's death was nonetheless unforeseeable. To be sure, a district court might well need to instruct the jury on foreseeability if the government's theory is (or the evi-

dence could suggest) that the controlled substance was a cause in fact of the victim's death, but not by overdose. See pp. 48-51, *infra* (addressing petitioner's non-overdose hypotheticals). But in the mine-run drug-overdose death case, instructions like the ones here (J.A. 241-242) adequately explicate the statutory element of "death * * * results" by telling the jury to decide whether a controlled substance was trafficked, and whether that substance was a cause in fact of the drug-overdose death of the person who used that controlled substance. No additional instruction on foreseeability is required. See *United States* v. *Park*, 421 U.S. 658, 675 (1975) (recognizing a district court's "discretion" to craft instructions that "viewed as a whole and in the context of the trial [are] not misleading and contain[] an adequate statement of the law to guide the jury's determination").

B. Petitioner's argument that a separate instruction on foreseeability is required because the "death results" provision contains a *mens rea* requirement is unsound

Petitioner contends (Br. 22-29) that the "death results" provision must require a separate instruction on foreseeability because, in his view, the government must prove that the defendant had a *mens rea* of at least recklessness with respect to the victim's death. The premise of that argument is incorrect; no *mens rea* requirement exists in the "death results" provision.[17]

---

[17] Petitioner does not appear to raise a freestanding claim of error concerning the lack of a jury instruction on his mental state with respect to Banka's death. Such a claim would be forfeited three times over. Petitioner requested no such instruction, nor raised that claim of error in either court below. See Br. in Opp. 9. Nor did he "set out [such a question] in the petition [for a writ of certiorari]" or make an "argument [in the petition] amplifying the reasons relied on" for such a claim. Sup. Ct. R. 14.1(a), (h).

1. As an initial matter, petitioner identifies no decision from any court holding that the government is required to prove the defendant's mental state with respect to *any* of the facts in the "penalties" provision of 21 U.S.C. 841(b)(1), much less a case addressing the "death results" provision. And the courts of appeals have uniformly held that no *mens rea* requirement attaches to the issues of drug type and quantity—the penalty-related facts in Section 841(b)(1) at issue in most drug trafficking cases.[18] Nothing justifies treating the "death results" provision in Section 841(b)(1) differently.

2. Of this Court's decisions, the best reference point for deciding whether the "death results" provision contains a *mens rea* requirement is *Dean*. That case addressed whether, under 18 U.S.C. 924(c)(1)(A)(iii), the "extra punishment Congress imposed for the discharge

---

[18] See, *e.g.*, *United States* v. *Collazo-Aponte*, 281 F.3d 320, 325-326 (1st Cir.) (quantity), cert. denied, 537 U.S. 869 (2002); *United States* v. *King*, 345 F.3d 149, 152-153 (2d Cir. 2003) (per curiam) (type and quantity), cert. denied, 540 U.S. 1167 (2004); *United States* v. *Barbosa*, 271 F.3d 438, 457-459 (3d Cir. 2001) (type), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Brower*, 336 F.3d 274, 276-277 (4th Cir.) (type), cert. denied, 540 U.S. 936 (2003); *United States* v. *Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir.) (type and quantity), cert. denied, 538 U.S. 1068 (2003); *United States* v. *Villarce*, 323 F.3d 435, 438-439 (6th Cir. 2003) (quantity); *United States* v. *Carrera*, 259 F.3d 818, 830 (7th Cir. 2001) (type and quantity); *United States* v. *Sheppard*, 219 F.3d 766, 768 n.2, 769 (8th Cir. 2000) (type), cert. denied, 531 U.S. 1200 (2001); *United States* v. *Carranza*, 289 F.3d 634, 643-644 (9th Cir.) (type and quantity), cert. denied, 537 U.S. 1037 (2002); *United States* v. *Briseno*, 163 Fed. Appx. 658, 665-666 (10th Cir.) (type), cert. denied, 547 U.S. 1157 (2006); *United States* v. *Garcia-Frias*, 239 Fed. Appx. 575, 577 (11th Cir. 2007) (per curiam) (type and quantity); *United States* v. *Branham*, 515 F.3d 1268, 1275-1276 (D.C. Cir. 2008) (type).

of a gun"—over and above the punishment for possessing the gun "'during and in relation to'" certain crimes—"applies when the gun goes off accidentally," that is, when the defendant lacks a heightened mental state with respect to the discharge. *Dean*, 556 U.S. at 570-571 (quoting 18 U.S.C. 924(c)(1)(A)).

Dean found no *mens rea* requirement, pointing to the absence of textual support and emphasizing that this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." 556 U.S. at 572 (quoting *Bates* v. *United States*, 522 U.S. 23, 29 (1997)). This Court pointed out that the nearest textual reference to *mens rea* was located in the statute's umbrella paragraph and did not carry "all the way down" into the discharge provision located in a "separate subsection[]." *Id.* at 573.

Dean also underscored that the discharge provision is framed in the passive voice. 556 U.S. at 572-573; see 18 U.S.C. 924(c)(1)(A)(iii) (prescribing enhanced punishment "if the firearm is discharged"). "The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572; see *ibid.* ("It is whether something happened—not how or why it happened—that matters."). Finally, this Court emphasized that, although "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Id.* at 575. As Blackstone explained:

> "[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing anything *unlawful*, and a consequence ensues which he did not

> foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior."

Id. at 575-576 (brackets in original) (quoting Blackstone 26-27).

Each of those observations in *Dean* applies equally to the "death results" provision:

- Like the provision *Dean* addressed, the "death results" provision has no textual reference to *mens rea*. Section 841(a) describes the primary offense conduct and requires a showing that the defendant "knowingly or intentionally" trafficked in a controlled substance. By contrast, Congress segregated certain facts bearing on the appropriate punishment into Section 841(b)(1), which makes no reference to *mens rea*. The difference signals that Congress intended not to require a showing of *mens rea* with respect to the matters in Section 841(b)(1). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). There is no basis to carry the *mens rea* requirement in Section 841(a) "all the way down" into the "death results" provision located in a "separate subsection[]." *Dean*, 556 U.S. at 573.[19]

---

[19] *Dean* thus shows why petitioner's reliance (Br. 23) on *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009), is misplaced. That case considered the reach of the modifier "knowingly" in the federal aggravated identity theft statute, which penalizes "[w]hoever, during and in relation to [certain specified felonies], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). This Court held that the government must prove that a Section 1028A(a)(1) defendant knew that the means of identification at

- Like the provision *Dean* addressed, the "death results" provision is phrased in the passive voice. See, *e.g.*, *United States* v. *Houston*, 406 F.3d 1121, 1124 (9th Cir.), cert. denied, 546 U.S. 914 (2005).

- Just as the *Dean* defendant's criminal culpability for the underlying firearm offense made it unproblematic to hold him responsible for an unintended discharge, so too here it would have been "no excuse" at common law that a drug trafficker "did not [subjectively] foresee or intend * * * the death of a man" as "a consequence" of his "antecedently * * * unlawful" trafficking. *Dean*, 556 U.S. at 576 (quoting Blackstone 26-27); see *X-Citement Video*, 513 U.S. at 73 n.3 ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.").

3. Petitioner resists these striking parallels to *Dean*, asserting that *Dean* is limited to sentencing factors (Br. 24) or peculiar to the discharge provision at issue (Br. 24-25). But the common law principles animating *Dean* also

---

issue "belonged to another person." *Flores-Figueroa*, 556 U.S. at 657.

Flores-Figueroa found, "[a]s a matter of ordinary English grammar," that it was "natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime," 556 U.S. at 650, because the entire provision was a single sentence of only two dozen words. But here, the "death results" provision is not in the same sentence as the phrase "knowingly or intentionally"; nor are they even the same subsection of the statute; indeed, more than 1000 words intervene between the two.

support the felony-murder rule, under which a defendant is held criminally responsible for deaths—even unintentional deaths—that result from the defendant's commission of a particularly dangerous intentional felony. See *Dean*, 556 U.S. at 575 (discussing the felony-murder rule). Felony-murder is not a sentencing factor; it has always been a criminal homicide,[20] and is so by statute in many States today.[21] "[F]elony-murder does contain an element of intent"—the intent to commit the predicate felony—but "not the intent to kill." *State* v. *Burkhart*, 103 P.3d 1037, 1047 (Mont. 2004). The same is true here: to be held criminally responsible under the "death results" provision of the CSA, the defendant must intend to traffic a controlled substance, but need not intend the death that results from its use.

C. Congress has long acquiesced in lower courts' uniform understanding that the "death results" provision does not require instruction on foreseeability in a case involving a drug-overdose death

1. Since at least 1994, the courts of appeals to consider the issue in drug-overdose cases have uniformly held that "the plain language" of the "death results" provision

---

[20] See, *e.g.*, Michael Dalton, *The Countrey Justice* 308 (1655) ("But if a man be doing of an unlawful act, though without any evill intent, and he happeneth by chance to kill a man, this is Felony, *viz.* Man-slaughter at the least, if not Murder."); Edward Coke, *The Third Part of the Institutes of the Laws of England* 57 (Hein Co. 1986) (1644) ("[W]hen a man doth an act" which "tendeth to a man's death," "[i]f the act be unlawful it is murder * * * for he had an ill intent, though that intent extended not to death.").

[21] See, *e.g.*, La. Rev. Stat. Ann. § 14:30.1(A)(2) (Supp. 2013); Mont. Code Ann. §§ 45-5-102(1)(b), -2-103(2) (2011); Tenn. Code Ann. § 39-13-202(a)(2) and (b) (West 2013); Va. Code Ann. § 18.2-33 (2009).

"does not require" the government to prove that "death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event." *Patterson*, 38 F.3d at 145.[22] In that time, Congress has amended Section 841(b)(1) six times (see note 2, *supra*), but it has never sought to alter those courts' uniform understanding that the "death results" provision does not require an instruction on foreseeability in a case involving a drug overdose.

2. That telling history parallels the history behind this Court's decision in *McBride*, which addressed the role of proximate cause in a provision of the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* Under FELA, "railroads [are] liable for employees' injuries or deaths 'resulting in whole or in part from [carrier] negligence.'" *McBride*, 131 S. Ct. at 2634 (quoting 45 U.S.C. 51) (second set of brackets in original). The Court held that the statute "does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions." *Id.* at 2634. Rather, the Court reaffirmed that "the test" Congress adopted to serve the function of proximate cause is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.*

---

[22] See, *e.g.*, *United States* v. *Webb*, 655 F.3d 1238, 1254-1255 (11th Cir. 2011) (per curiam), cert. denied, 132 S. Ct. 1131 (2012); *Houston*, 406 F.3d at 1124-1125; *United States* v. *Soler*, 275 F.3d 146, 152-153 (1st Cir.), cert. denied, 535 U.S. 1071 (2002); *United States* v. *McIntosh*, 236 F.3d 968, 971-974 (8th Cir.), cert. denied, 532 U.S. 1022 (2001); *Robinson*, 167 F.3d at 830-832; see also *Hatfield*, 591 F.3d at 949 (dicta); *United States* v. *Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) (describing the "death results" provision as "a strict liability statute"), overruled on other grounds by *United States* v. *Leachman*, 309 F.3d 377, 385 n.9 (6th Cir. 2002), cert. denied, 538 U.S. 969 (2003).

at 2636 (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)).

McBride is relevant in two respects. First, it reflects this Court's recognition that Congress sometimes replaces default principles of proximate causation with special rules adapted to the circumstances at hand. See *McBride*, 131 S. Ct. at 2641 (explaining that the Court's decision in *Rogers* does not "eliminate[] the *concept* of proximate cause" but rather "describes the test for proximate causation applicable in FELA suits"). Congress has done so in the "death results" provision by recognizing that a drug trafficker can reasonably foresee the drug-overdose deaths of which his drugs are a cause in fact. Second, *McBride* emphasized that, in light of this Court's 1957 decision in *Rogers*, the courts of appeals had uniformly rejected a default proximate cause standard in FELA cases. 131 S. Ct. at 2640. The Court found it significant that "Congress has had more than 50 years in which it could have corrected" that approach "if it disagreed with it, and has not chosen to do so." *Id.* at 2641 (internal quotation marks and alterations omitted). So too here, Congress has acquiesced in the uniform judicial interpretation of the "death results" provision.

D. The "death results" provision would require a jury instruction on foreseeability in some cases, but an ordinary drug-overdose case does not implicate that requirement

Petitioner relies on elaborate hypotheticals (Br. 21) to suggest that a foreseeability requirement is necessary to avoid an enhanced sentence for deaths that are causally remote from the user's drug use. The Seventh Circuit in *Hatfield* likewise expressed concern about applying the "death results" provision in a hypothetical case in which "a defendant sells an illegal drug to a person who, not

wanting to be seen ingesting it, takes it into his bathroom, and while he is there the bathroom ceiling collapses and kills him." 591 F.3d at 948.

Those hypotheticals do not suggest any instructional error here. The courts of appeals have long interpreted the "death results" provision not to require proof of foreseeability in connection with drug-overdose deaths (see note 22, *supra*), yet petitioner cites *not one actual case* in which that has led to an untoward result. The government has likewise identified no conviction on facts even arguably comparable to petitioner's imagined horribles.[23] In the face of similar invented scenarios, this Court in *Dean* and *McBride* refused to adopt extra-textual requirements of *mens rea* and proximate cause. *Dean*, 556 U.S. at 574 (declining to "contort[] and stretch[] the statutory language to imply an intent requirement" based on "[f]anciful hypotheticals"); *McBride*, 131 S. Ct. at 2641 ("[A] half century's experience * * * gives us little cause for concern: [the defendant's] briefs did not identify even *one* trial in which the instruction generated an absurd or untoward [outcome].").

---

[23] The government has identified only one conviction under the "death results" provision in which the victim's immediate cause of death was not an overdose (*i.e.*, the internal physiological effects of the controlled substance), but instead something external. The defendant in *United States* v. *Roman*, No. 09-cr-77 (C.D. Cal.), pleaded guilty to, *inter alia*, distributing Schedule I hallucinogenic mushrooms to a 17-year-old girl who ingested them, suffered severe hallucinations, and ran naked onto a freeway where she was struck and killed by a motorist. See U.S. Atty's Off., *Ventura County Man Sentenced to 15 Years in Federal Prison for Selling "Magic Mushrooms" to Teenagers, One of Whom Was Killed After Running onto Freeway* (Aug. 3, 2009), http://www.justice.gov/usao/cac/Pressroom/pr2009/092.html.

"Fanciful hypotheticals," *Dean*, 556 U.S. at 574, are better addressed (if at all) in more measured fashion. Petitioner is surely correct that a prosecution under the causal theories of death in his hypotheticals would require jury instructions different from the ones given at his trial. Explicating the statutory "death * * * results" element for the jury in such a case might lead a court to include an instruction about foreseeability, or one about intervening and superseding causes, or any of a number of proximate cause concepts. Significantly, though, such instructions would be appropriate not because the "death results" provision inflexibly commands them in every case, but instead because they would have a foundation in the theory of the prosecution and the evidence at trial. Cf. *United States* v. *Swallow*, 109 F.3d 656, 659 (10th Cir. 1997) ("An instruction as to intervening cause is not proper absent evidence to sustain it."); *Vallery* v. *State*, 46 P.3d 66, 78 (Nev. 2002) ("[The defendant] proffered instructions on intervening, superseding acts. * * * Given [the evidence at trial], the facts do not support an instruction on intervening, superseding acts.").

The structure of the CSA supports the distinction between "death results" cases prosecuted on an overdose theory and those prosecuted on another theory. As explained above, by placing a controlled substance on Schedule I or II, Congress (or the Attorney General) has made a determination that the substance is dangerous and prone to abuse—in other words, its use foreseeably risks death or injury to the user through its effect on the user's physiology. See pp. 2-3, *supra*. By contrast, scenarios involving deaths from drug-impaired behavior (Pet. Br. 21) or furtive drug use (*Hatfield*, 591 F.3d at 948) do not similarly implicate the foundational policy

judgments of the CSA. The different judgments Congress embedded in the CSA can most sensibly be reflected by different instructions adapted to different fact patterns prosecuted under that law. It is enough to say here that Congress's judgment with respect to drug-overdose deaths like Banka's was that no separate jury instruction on foreseeability was necessary.

E. If adopted, petitioner's foreseeability argument would at most entitle him to a new trial, not an acquittal

Petitioner contends that "[t]he record in this case affirmatively establishes * * * that Mr. Banka's death was *not* a foreseeable consequence of his partial use of the heroin [petitioner] sold him" (Pet. Br. 29) and that his conviction therefore "must be overturned" (*id.* at 31). Petitioner is incorrect to the extent he suggests that he would be entitled to a judgment of acquittal on the "death results" charge if this Court concludes the jury should have been instructed to decide whether Banka's death was foreseeable. Rather, petitioner would be entitled only to a new trial at which the jury would be instructed on foreseeability, for two independent reasons.

First, petitioner did not preserve a sufficiency-of-the-evidence claim as to foreseeability. When he moved in the district court for a judgment of acquittal under Rule 29, he did not assert that the government had failed to prove proximate cause or reasonable foreseeability. J.A. 214-216, 220. Rather, petitioner preserved his foreseeability claim only by objecting to the jury instructions. J.A. 221-222, 236-238. The remedy for such an instructional error is a new trial. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 465 (1978).

Second, even if petitioner had preserved a sufficiency claim as to the foreseeability of Banka's death, it would fail. The jury could infer from petitioner's heroin sales

that he was familiar with the drug's properties and risks. And the jury had evidence that the particular amount of heroin petitioner distributed to Banka (1 gram, J.A. 101-104) was more than enough to cause death, given that Banka had used well less than half of it (leaving at least 0.59 grams, Tr. 154), yet that fraction of petitioner's sale had alone produced a morphine level in Banka's blood that "would be expected to be highly toxic" and "represent[ed] a dose that would exceed what would be tolerable for a nontolerant individual" (J.A. 195-196).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BENJAMIN J. HORWICH
Assistant to the Solicitor General
STEPHAN E. OESTREICHER, JR.
Attorney

OCTOBER 2013

REPLY BRIEF

No. 12-7515

IN THE

Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
RYAN C. MORRIS
JEREMY M. BYLUND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ANGELA L. CAMPBELL*
GARY DICKEY JR.
DICKEY & CAMPBELL LAW FIRM PLC
301 East Walnut Street, Suite 1
Des Moines, IA 50309
(515) 288-5008
angela@dickeycampbell.com

Counsel for Petitioner Marcus Andrew Burrage

* Counsel of Record

October 31, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. THE "DEATH RESULTS" PROVISION REQUIRES BUT FOR CAUSATION	1
2. THE SOLICITOR GENERAL'S ATTEMPTS TO CONTROVERT THE REQUIREMENT OF BUT FOR CAUSE IN THIS CASE ARE UNAVAILING	4
3. THE COMMON LAW REQUIRES BUT FOR CAUSATION IN CRIMINAL CASES	6
4. PROXIMATE CAUSE AND FORESEEABILITY ARE REQUIRED	11
5. DEATH FROM DRUG OVERDOSE IS NOT PER SE FORESEEABLE	13
6. CONTRIBUTING CAUSE IS UNACCEPTABLE IN CRIMINAL LAW	14
CONCLUSION	17
APPENDIX A	1a
APPENDIX B	1b

TABLE OF AUTHORITIES

Page(s)

CASES

Alleyne v. *United States*, 133 S. Ct. 2151 (2013) 15
Commonwealth v. *Osachuk*, 681 N.E.2d 292 (Mass. App. Ct. 1997) 9, 10
Cox v. *State*, 808 S.W.2d 306 (Ark. 1991) 8
Gross v. *FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009) 3, 11
Hemi Grp., LLC v. *City of New York*, 559 U.S. 1 (2010) 11
Holmes v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) 12
Kimbrough v. *United States*, 552 U.S. 85 (2007) 12
Meyer v. *Holley*, 537 U.S. 280 (2003) 2, 12
People v. *Bailey*, 549 N.W.2d 325 (Mich. 1996) 9
People v. *Schaefer*, 703 N.W.2d 774 (Mich. 2005) 7
State v. *Dennison*, 801 P.2d 193 (Wash. 1990) (en banc) 7
State v. *Des Champs*, 120 S.E. 491 (S.C. 1923) 8
State v. *Scott*, 12 La. Ann. 274 (1857) 8
United States v. *Monzel*, 641 F.3d 528 (D.C. Cir. 2011) 14
Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, 133 S. Ct. 2517 (2013) 11
Warner v. *State*, 135 N.E. 249 (Ohio 1922) . 8

STATUTES

21 U.S.C. § 356(a)(1) 3
21 U.S.C. § 823(g)(2)(A) 3
21 U.S.C. § 841 ..... 2, 15

TABLE OF AUTHORITIES—continued

Page(s)

22 U.S.C. § 3774(6) 4
23 U.S.C. § 405(d) 2
33 U.S.C. § 1320(d) 4
33 U.S.C. § 1321(h) 4
33 U.S.C. § 1364(a) 3
42 U.S.C. § 299b-1(b)(2) 3
42 U.S.C. § 7475(a)(3) 4
42 U.S.C. § 9658(a)(1) 4
46 U.S.C. § 6301 4

OTHER AUTHORITIES

1 Francis Wharton, *Wharton's Criminal Law* § 26 (15th ed. 1993) 7
1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4 (2d ed. 2003) 5, 6, 8, 10, 16
Brief for the United States, *Paroline* v. *United States*, No. 12-8561, 2013 WL 5425148 (S. Ct. Sept. 27, 2013) 5
Model Penal Code § 2.03 (1985) 2, 16
Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735 (Dec. 1985) 5
Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3d ed. 1982) 8
WestlawNext, https://a.next/westlaw.com/Search/Home.html (search U.S. Supreme Court Cases for "LaFave"; search U.S. Supreme Court Cases for "Perkin /s Boyce") (last visited Oct. 30, 2013) 8
William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 401 (7th ed. 1967) 7

The Solicitor General acknowledges that the "death results" provision "plainly requires proof of causation," Br. Resp't 13, and does not dispute that the majority rule of criminal common law requires but for and proximate cause. Br. Resp't 18, 39. Nonetheless, the Solicitor General suggests that it is somehow consonant with 21 U.S.C. § 841(b)(1)(C)'s plain text to import a different, relaxed civil standard and impose a twenty-year mandatory minimum sentence upon "a showing that use of the controlled substance contributed to the victim's death." Br. Resp't 27. The Solicitor General's suggestion contradicts this Court's precedent and represents a significant departure from the common law that Congress has not authorized.

1. THE "DEATH RESULTS" PROVISION REQUIRES BUT FOR CAUSATION.

The Solicitor General claims that the contributing cause standard is "fully consistent with the 'death results' provision[] . . . ." Br. Resp't 17. But the Solicitor General's standard bears no relation to the statute, and its invitation to read-in a contributing cause standard is in direct conflict with this Court's precedent. Nowhere does the Solicitor General point to any express language in the text of the statute that provides the basis of its assertion that this Court should override the established meaning of "death results" language. In fact, the claim that Congress was targeting mixed-drug use with the "death results" provision is speculative at best. If Congress intended to address mixed-drug intoxication, it would have expressly written the statute to cover such scenarios.

The Solicitor General asserts that Congress intended a contributing cause standard because "[d]rug users often administer drugs in combination . . . ." Br.

Resp't 28; see also Br. Resp't 29 (referencing "the prevalence of mixed-drug overdoses"). Yet the causal language in 21 U.S.C. § 841(b)(1)(C) ("death or serious bodily injury results from *the* use of *such* substance") (emphasis added), plainly does not refer to or even imply mixed-drug use. Nor can the Solicitor General point to any legislative history or fact-finding related to such mixed-drug use. What evidence there is, including the language of this statute and the language of other statutes, points in the other direction.

The Solicitor General's invitation to read-in a contributing cause standard also directly contradicts the Court's opinion in *Meyer* v. *Holley*, 537 U.S. 280, 286 (2003), holding that: "[S]ilence, while permitting an inference that Congress intended to apply *ordinary* background . . . principles, cannot show that it intended to apply an unusual modification of those rules." Here, the "ordinary background principles" are not in controversy. When the death results language was added to the Controlled Substances Act ("CSA") in 1988, the 1985 Model Penal Code provided that "conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred." Model Penal Code § 2.03(1) (1985). Since 1985, that "ordinary background principle" has remained true. Thus, even if it were accurate to say that Congress was "silent" on the proper causal standard (in spite of the paragraph above), the only allowable inference under *Meyer* is that the "but for" standard continues to govern.

When Congress intends to refer to mixed-drug use, it does so explicitly. For instance, Congress has acknowledged the dangers of "driving under the influence of alcohol, drugs, or the combination of alcohol and drugs." 23 U.S.C. § 405(d) (awarding grants to States implementing programs to reduce driving

under the influence). Congress has provided for the expedited approval of prescription drugs that, whether "alone or in combination with [one] or more other drugs," are meant to treat life-threatening diseases. 21 U.S.C. § 356(a)(1). Congress has explicitly sought to increase awareness of the "risks of combinations of drugs and biological products." 42 U.S.C. § 299b-1(b)(2). Finally, in amending the Controlled Substances Act in 2000, Congress acknowledged that narcotics are often dispensed in combination. See 21 U.S.C. § 823(g)(2)(A) (waiving registration requirements for practitioners dispensing "combinations" of scheduled drugs for detoxification purposes). By contrast, Congress made no such amendment to the "death results" provision. See *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

The Solicitor General also asserts that "[t]he context in which the 'death results' provision is applied—typically, death by drug overdose—gives particular reason to think Congress intended a contributing-cause test." Br. Resp't 28. But that argument fails for the same reasons as the "mixed-drug use" assertion. Contributing cause language is missing from the statute, missing from the legislative history, missing from the ordinary background principles at the time of enactment, and sufficiently prevalent in other federal statutes to permit the Court to conclude that Congress did not simply forget to include it.

Congress has granted the authority to seek injunctive relief against "any person causing or contributing to" dangerous water pollution. 33 U.S.C. § 1364(a) (enacted in 1972). Congress has differentiated between "the cause" and acts that might have "contributed to the cause" of marine casualties.

46 U.S.C. § 6301(1)–(3) (enacted in 1983). Congress has addressed the statute of limitations for state law claims where an injury or damage is "caused or contributed to by exposure to any hazardous substance." 42 U.S.C. § 9658(a)(1) (language added by amendment in 1986). Congress has limited responsibility to situations where an accident "was caused, or contributed to, by the negligence of an employee." 22 U.S.C. § 3774(6) (enacted in 1985). Congress has affirmatively preserved the rights of the United States against third parties who may have "caused or contributed to the discharge of oil or hazardous substance[s]." 33 U.S.C. § 1321(h) (enacted in 1972). Congress has required facilities to demonstrate that they will not "cause, or contribute to, air pollution" over prescribed levels. 42 U.S.C. § 7475(a)(3) (enacted in 1977). Congress has authorized mandatory reporting for those "causing or contributing to pollution." 33 U.S.C. § 1320(d) (enacted in 1972). These examples are just a handful of those instances where Congress has explicitly referred to potential contributing cause scenarios. See also App. A. Here, however, Congress made no attempt to incorporate contributing cause language in the "death results" provision.

2. THE SOLICITOR GENERAL'S ATTEMPTS TO CONTROVERT THE REQUIREMENT OF BUT FOR CAUSE IN THIS CASE ARE UNAVAILING.

Fears that contributing actors would be "absolved" altogether of criminal liability underlie the sources upon which the Solicitor General relies in arguing that a contributing cause standard is appropriate where no single "but for" cause can be identified. See Br. Resp't 26, 26 n.9. Even the Solicitor General's own brief in the referenced *Paroline* case argues that: "The traditional 'but-for' test is inappropriate in cases

like this one because it would *absolve* culpable defendants (like petitioner) and leave victims (like Amy) without restitution . . . ." Brief for the United States at 19, *Paroline* v. *United States*, No. 12-8561, 2013 WL 5425148, at *19 (S. Ct. Sept. 27, 2013) (emphasis added). But there can be no concern in this case that Mr. Burrage and other defendants like him might be "absolved." The only question here is whether Mr. Burrage may lawfully be sentenced to a twenty-year mandatory minimum sentence, not whether he will escape criminal liability and the imposition of sentence altogether.

The Solicitor General relies primarily on two hypotheticals where but for causation fails implying that criminal liability would never be established without a relaxed causation standard.[1] Br. Resp't 18–19. From these hypotheticals, the Solicitor General concludes that but for causation should not be applied in this case. The argument is misleading for two reasons. First, in posing the scenarios, Professor LaFave specifically cautions that each act is "alone sufficient to bring about the harmful result." LaFave, *supra* note 1, at 468. The so-called failure of but for causation only results from the fact that there was a second, sufficient concurrent act, not because the first act was insufficient by itself. Professor LaFave never rejects the but for test, instead providing a "more ac-

---

[1] In the criminal context: "*A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also inflicting such a wound; and *B* dies from the combined effects." 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b), at 468 (2d ed. 2003). And in the civil context: "*C* and *D* independently start separate fires, each of which would have been sufficient to destroy *P*'s house. The fires converge and together burn down the house." Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1775–76 (Dec. 1985). Both hypotheticals are addressed by Professor LaFave.

curately worded" cause-in-fact test to account for the logical twist. *Id.* Unlike the Solicitor General, Professor LaFave does not lower the threshold to establish causation-in-fact, but instead LaFave accounts for the hypotheticals where there are two sufficient causes in defining cause-in-fact. Second, the Solicitor General ignores the practical distinction between criminal and civil law; namely, that criminal defendants are exposed to liability for different roles (*e.g.*, as principals, co-conspirators, or aiders and abettors), and to varying degrees (*e.g.*, for aggravated versions of the crime, for lesser-included offenses, or for attempts). Thus, in the criminal context, neither hypothetical would result in a finding of no-liability at all, even without the addition of the substantial factor language: A and X would go to prison for attempted murder, while C and D would still go to prison for arson, presuming the fires were set intentionally.

In the civil context, where the courts are more concerned about restitution to the injured plaintiff, rather than imposing criminal penalties, the defendants could share liability using the substantial factor language. A and X would both civilly be liable for the value of B's life and C and D could be found equally liable for burning down P's house. The important difference is that B's estate would only recover the value of his life once and P would still only recover the value of his house once. A, X, C and D would not have to each pay for the full value individually.

3. THE COMMON LAW REQUIRES BUT FOR CAUSATION IN CRIMINAL CASES.

The Solicitor General does not dispute that the but for test is a "practical and reliable guide to causation . . . ." Br. Resp't 18. Rather, the Solicitor General makes the surprising claim that "[c]riminal law generally does not insist on but-for causation." *Id.* For

support, the Solicitor General relies upon causation scenarios that are both hypothetical and inapposite, as well as civil authorities that are unpersuasive here. At the end of the day, the Solicitor General is unable to overcome the "basic theory of causation . . . that the culpable act or omission must be a causa sine qua non (inevitable or necessary cause)." William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 401, at 210 (7th ed. 1967); see also 1 Francis Wharton, *Wharton's Criminal Law* § 26, at 146 (15th ed. 1993) ("Where the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the accused's conduct was an antecedent 'but for' which the result in question would not have occurred."). Despite the Solicitor General's assertion and citation of nine cases, but for cause has a stronghold in common law.

Courts have consistently applied a but for test when assessing causation-in-fact. The Solicitor General's assertion that but for cause is not required is simply not supported by the vast majority of common law precedent. See, *e.g.*, App. B. For example, the Michigan Supreme Court has stated: "In determining whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred?" *People* v. *Schaefer*, 703 N.W.2d 774, 785 (Mich. 2005). Similarly, the Washington Supreme Court has indicated that "[c]ause in fact refers to the 'but for' consequences of an act . . . ." *State* v. *Dennison*, 801 P.2d 193, 201 (Wash. 1990) (en banc).

Moreover, in *Warner* v. *State*, the Ohio Supreme Court upheld a jury instruction on causation that: "It must also be shown . . . that the violation of law on his part was the circumstance but for which the collision resulting in the death . . . would not have oc-

curred." 135 N.E. 249, 251 (Ohio 1922). Similarly, in *State* v. *Scott*, the Supreme Court of Louisiana addressed the issue of cause-in-fact:

> The true point is, did the party die of the wounds inflicted by the accused? If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original hurt, cannot mitigate the crime of the person whose malice caused the death.

12 La. Ann. 274, 275 (1857). In other words, but for the defendant's wound, the deceased would have lived. Similarly, in *State* v. *Des Champs*, the Supreme Court of South Carolina defined proximate cause as "'that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and *without which the result would not have occurred*.'" 120 S.E. 491, 493 (S.C. 1923) (emphasis added) (quoting 22 R.C.L. 110, § 2). These examples track Professor LaFave's contention that cause-in-fact is traditionally determined by asking if "but for the conduct the result would not have occurred." LaFave, *supra* note 1, § 6.4, at 464.[2]

The cases cited by the Solicitor General, in contrast, offer meager support. In *Cox* v. *State*, 808 S.W.2d 306 (Ark. 1991), the defendants were tried for joint criminal conduct. More importantly, *Cox* involved a statutory definition of causation unique to

---

[2] The Solicitor General relies heavily on Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3d ed. 1982). Even Perkins & Boyce acknowledge that problems of actual causation are commonly examined under a but for test. *Supra*, at 772. Moreover, this Court has referenced Professor LaFave in 164 cases, whereas it has cited Perkins & Boyce in only 7 cases. (WestlawNext, https://a.next/westlaw.com/Search/Home.html (search U.S. Supreme Court Cases for "LaFave"; search U.S. Supreme Court Cases for "Perkin /s Boyce") (last visited Oct. 30, 2013)).

Arkansas that expressly departs from the traditional notion of cause-in-fact—a departure not present in the "death results" provision. *Cox* is also a capital murder case. Intentional murder is much different than an unintentional death resulting from the distribution of heroin. Indeed, drug dealers have no incentive to kill their customers, unlike murderers whose crime is specifically aimed at ending the life of another.

The Solicitor General also cites *People* v. *Jennings*, 237 P.3d 474 (Cal. 2010), as rejecting but for causation. Br. Resp't 19. But *Jennings* involved a defendant charged as an aider and abettor. Thus, even assuming the defendant's co-conspirator's acts were the sole cause of death, the defendant was still guilty as an aider and abettor. Additionally, the Solicitor General's selective quotation of *People* v. *Bailey* is especially puzzling. Br. Resp't 20. The full quote from the opinion reads: "In assessing criminal liability for some harm, it is not necessary that the party convicted . . . be the sole cause of that harm, only that he be a contributory cause *that was a substantial factor in producing the harm*." 549 N.W.2d 325, 334 (Mich. 1996) (emphasis added). If this explanation of causation looks familiar it is because it tracks closely to the proposed jury instruction Mr. Burrage requested at trial, J.A. 238, and the standard advocated by Professor LaFave.

Lastly, the Solicitor General's reliance upon *Commonwealth* v. *Osachuk*, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997), Br. Resp't 19, is misleading. Unlike the Solicitor General's approach, the court in *Osachuk* required proximate cause. 681 N.E.2d at 294. Moreover, the defendant in *Osachuk* argued that he did not cause the victim's death because the victim ingested and injected two of the three narcotics that

combined to cause death (the defendant injected the third). *Id.* What the Solicitor General failed to mention is that "the defendant provided [the deceased] with every drug that contributed to her death." *Id.* at 295.

In contrast to *Osachuk*, Mr. Burrage did not provide Banka with the oxycodone or marijuana or alprazolam or clonazepam that was abused during his drug binge. The only narcotic that Mr. Burrage is responsible for is the heroin. Under traditional principles of cause-in-fact, Mr. Burrage can only be said to have caused the death if "the result would not have happened in the absence of [his] conduct." LaFave, *supra* note 1, at 467. Yet neither the medical examiner nor the toxicologist could say whether Banka would have lived if he had not taken the heroin. J.A. 159–60, 208. Accordingly, as the Solicitor General concedes, Mr. Burrage cannot be held liable for Banka's death under the "but for" test. Br. Resp't 33.

The same holds true for Professor LaFave's substantial factor test. Where multiple concurrent acts operate together, as here, the test is whether each was alone *independently* sufficient to cause the result. See LaFave, *supra* note 1, at 468. Neither expert at trial could testify that the heroin was independently sufficient to cause Banka's death. J.A. 159–60, 202–03. Thus, Mr. Burrage cannot be held responsible for Banka's death under Professor LaFave's substantial factor test, either. To avoid this result, the Solicitor General now advocates a sharp divergence from the criminal common law's strict cause-in-fact requirements.

As the Solicitor General notes, Professor LaFave references state statutes that address concurrent-cause situations with contributory cause standards. Br. Resp't 20 (citing LaFave, *supra* note 1, at 468

n.14). But the enactment of statutes that expressly impose contributing cause liability only serves as proof that legislatures recognize the need to except a particular form of criminal liability from the common law tradition. If the common law on its own deviated from the traditional but for standard, there would be little need for express statutory language in the first place.[3]

4. PROXIMATE CAUSE AND FORESEEABILITY ARE REQUIRED.

The Solicitor General is incorrect that the text of 21 U.S.C. § 841(b)(1)(C) does not require proximate cause, which in criminal law means foreseeability. Congress legislates against the background principles of the common law, which include foreseeability as a prerequisite to imposing criminal liability. See Br. Pet'r 18–22. To determine that Congress intended to deviate from the established meaning of the "results

---

[3] Ultimately, the Solicitor General tries to wrongly import a civil standard into criminal law. But even assuming civil standards apply, the text of the "death results" provision still requires but for cause. In *Gross*, this Court rejected a similar contributing cause standard in favor of the traditional but for test. Like the Solicitor General, the petitioner in *Gross* argued that the ADEA's "because of" language encompassed mixed-motive scenarios. 557 U.S. at 173–77. Again, in *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, this Court rejected the same contributing cause approach as applied to Title VII's "because" language. In support, this Court affirmed that "[i]t is . . . textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" 133 S. Ct. 2517, 2525 (2013) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)). Likewise, in the civil RICO context, this Court also recently affirmed that the statutory language "by reason of" requires both "but for" and proximate cause. *See Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

in" language, there must be convincing evidence in the text itself. No such evidence is present, and the normal common law rule of proximate cause applies. See *Meyer*, 537 U.S. at 286; see also *Holmes*, 503 U.S. at 287 (Scalia, J., concurring) (calling "judicial inference of a proximate-cause requirement" a "background practice against which Congress legislates."). The "death results" provision does not include an express alteration to the applicable background rule, so the presumption in favor of foreseeability remains intact.

The legislative history upon which the Solicitor General relies (see Br. Resp't 34–35, 35 n.11) is tangential to the "death results" provision at issue in this case. The Solicitor General cites two amendments to different provisions of the CSA, one of which was never passed, and both of which have no effect today. Br. Resp't 35 n.11. In particular, the Solicitor General points to a failed House amendment to the bill that eventually became the Anti-Drug Abuse Act of 1986, and a provision in the Anti-Drug Abuse Act of 1988, which was repealed in 2006. Br. Resp't 35 n.11. Both provisions involved foreseeability as a mitigating factor when a defendant faced the death penalty. The failed amendment to a different provision of the CSA cannot provide the evidence necessary to change the meaning of the "death results" provision. If an amendment is not adopted, it does not inform the meaning of the text. See *Kimbrough* v. *United States*, 552 U.S. 85, 106 (2007) ("Ordinarily, we resist reading congressional intent into congressional inaction."). Both provisions cited by the Solicitor General are temporally and topically disconnected from the "death results" provision at issue here, and do not inform congressional intent.

5. DEATH FROM DRUG OVERDOSE IS NOT PER SE FORESEEABLE.

The Solicitor General also claims: "Congress elected to treat drug-overdose deaths caused in fact by controlled substances as per se foreseeable to the criminals who traffic those dangerous substances." Br. Resp't 39. This proposition is not supported by the data or the text of the statute. Even if "the lethality of drugs in combination is well-studied and widely recognized," (Br. Resp't 28) the Solicitor General cannot support that proposition with congressional findings or the text of the statute. Similarly, the Solicitor General's narrative about the history of and motivations for the CSA (see Br. Resp't 3–5) amounts only to speculation as to its application to a foreseeability requirement.

Research on illegal drug use and drug overdose deaths does not indicate that a drug overdose resulting in death is per se foreseeable to individuals who sell drugs. Although it may be "foreseeable that a drug user who obtains a controlled substance will use it," Br. Resp't 39, it does not follow that death from a drug overdose is sufficiently prevalent that it is per se foreseeable. The articles upon which the Solicitor General relies (see Br. Resp't 28–29 n.10) deal with combination drug deaths; they do not speak to the foreseeability of overdose death in general from the perspective of the individual seller participating in an individual transaction involving a single drug. Similarly, the information conveyed exclusively to the Solicitor General by the National Center for Injury Prevention and Control does not address the likelihood that an individual drug user is someone who uses or plans to use drugs in combination.

The appropriate foreseeability analysis focuses on the likelihood that an individual drug user will over-

dose on the particular drugs sold. The numbers provided by the Solicitor General[4] indicate that less than one percent of those addicted to heroin, not even including casual users, overdose. Br. Resp't 5 n.3. Neither the text of the "death results" provision nor the likelihood that an individual drug user will die from a drug overdose indicate that Congress elected to treat drug overdose death as per se foreseeable.

The Solicitor General's claim that Congress rejected a case-specific foreseeability inquiry (Br. Resp't 40) is mere speculation because Congress did not state that it meant to do so. Importantly, Congress did not cite to any statistics in 21 U.S.C. § 841(b). "[A] 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all." *United States* v. *Monzel*, 641 F.3d 528, 537 n.8 (D.C. Cir. 2011). When a twenty-year mandatory minimum sentence hangs in the balance, making assumptions about congressional intent is particularly reckless. Neither the text of the "death results" provision, nor the uncited studies about the likelihood that an individual drug user will die from a drug overdose, indicate that Congress elected to eliminate a proximate causation requirement and treat drug overdose death as per se foreseeable.

6. CONTRIBUTING CAUSE IS UNACCEPTABLE IN CRIMINAL LAW.

The Solicitor General retreats to a position that a but for, or independently sufficient, test is "imprecise." Br. Resp't 25 n.8. According to the Solicitor General, "'few if any acts are sufficient by themselves to produce any particular consequence.'" *Id.* (citing

---

[4] The numbers provided by the Solicitor General come in part from non-public sources that were not provided to Mr. Burrage, therefore Mr. Burrage has no way of verifying their validity.

Wright, *supra* note 1, at 1776). The Solicitor General explains that there are many other factors involved in any incident, such as "combustible material exist[ing] near the house and that oxygen be present in the air" in an arson hypothetical. *Id.*

That myriad causal agents exist in any scenario only serves to show why there is no place for a contributing cause standard in criminal cases. Nor is it accurate to say that a "but for" test is any more or less imprecise than other causal standards. A contributing cause standard is only more "precise" because it is tautological. Any person's actions might be deemed a contributing cause, whether non-culpable or culpable. Once the prosecution establishes that a person's actions had some role to play in the ultimate event, the contributing cause standard is satisfied in each and every case. [5]

---

[5] The Solicitor General's contributing cause standard violates the spirit of *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, this Court held that only a jury could decide if a defendant's conduct met the requirements for a mandatory minimum sentence. 133 S. Ct. at 2163–64. The Solicitor General's proposed causal standard sets such a low bar that it would effectively take the decision about which defendants are culpable out of the hands of the jury. 21 U.S.C. § 841(a)(1) makes it unlawful to knowingly distribute a controlled substance. When that controlled substance is heroin, then § 841(b)(1)(C) sets a punishment of "not more than 20 years." Where, however, "death or serious bodily injury results from the use of such substance" the penalty is a mandatory minimum of twenty years with a maximum of life. *Id.* The Solicitor General's contributing cause standard is such a low bar that whenever there is a death, then the mandatory minimum will attach because the test is tautological: if a defendant distributed a drug and the recipient of the drug died, then the defendant contributed to the death. Such a test robs the jury of its function, as recognized by *Alleyne*, of deciding which defendants are culpable of causing a death and therefore deserving of the mandatory minimum sentence.

This underscores the reason why there is no place for a contributing cause standard in criminal law. The Amici suggest that this Court should draw a line between where the defendant's conduct made a "positive incremental contribution to a causal mechanism that, in the aggregate, is a but-for cause of the proscribed result" and should leave undecided the question of "whether factual causation requires something else in addition to contribution." Br. of Amici Curiae States 20, 27. But here they are one and the same. The contributing-cause standard proposed by the Solicitor General and urged by the Amici States cannot be what Congress intended in imposing a heightened sentence. The "death results" provision requires something more exacting before imposing a mandatory minimum of twenty years to life for a result not wholly or even substantially caused by the defendant's conduct. It requires that death or serious bodily injury "results from" the drug use.

The Solicitor General would have this Court depart from traditional principles of criminal law and impose a contributing causal standard with no mens rea component. As Professor LaFave highlights, when a crime requires no mens rea, then there is traditionally a strict but for and proximate cause requirement. LaFave, *supra* note 1, § 6.4(j), at 501. The Model Penal Code adopted this but for and proximate cause standard for strict liability crimes. Model Penal Code § 2.03(4) (1985). Here, the Solicitor General is advocating for a departure from this longstanding consensus by pairing a relaxed causal standard with no requirement of mens rea. This Court should reject such a relaxed criminal liability standard when a twenty-year mandatory minimum to life sentence is at issue.

CONCLUSION

For the foregoing reasons, the Court should overturn Mr. Burrage's conviction and remand the case for judgment of acquittal or a new trial.

Respectfully submitted,

JEFFREY T. GREEN
RYAN C. MORRIS
JEREMY M. BYLUND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ANGELA L. CAMPBELL*
GARY DICKEY JR.
DICKEY & CAMPBELL LAW FIRM PLC
301 East Walnut Street, Suite 1
Des Moines, IA 50309
(515) 288-5008
angela@dickeycampbell.com

Counsel for Petitioner Marcus Andrew Burrage

October 31, 2013

* Counsel of Record

APPENDIX

APPENDIX A

19 U.S.C. § 2272(c)(1) (defining "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause.") (enacted in 1975).

19 U.S.C. § 2435(b)(3) (requiring consultations whenever commercial imports "cause or threaten to cause, or significantly contribute to, market disruption . . . .") (enacted in 1975).

15 U.S.C. § 2603(e)(1)(A)(viii) (giving priority to substances known "to cause or contribute to" cancer or other conditions) (enacted in 1976).

30 U.S.C. § 814(e)(1) (requiring notice be given to operator of mine with health violations that could "significantly and substantially contribute[] to the cause and effect of coal or other mine health or safety hazards . . . .") (enacted in 1977).

42 U.S.C. § 7491(a)(3)(B) (calling for the creation of modeling techniques to determine how much manmade air pollution will "cause or contribute to" visibility impairment) (enacted in 1977).

42 U.S.C. § 7616(b)(3)(A) (authority to withhold grants where the construction of a new sewage treatment plant would "cause or contribute to . . . an increase in emissions . . . .") (enacted in 1977).

42 U.S.C. § 9601(20)(B) (transporter of hazardous substances "shall not be considered to have caused or contributed to any release . . . which resulted solely from circumstances or conditions beyond his control.") (enacted in 1980).

42 U.S.C. § 300i(a) (granting authority to order the provision of supplies by those who "caused or contributed to" water contamination) (language added by amendment in 1986).

19 U.S.C. § 2436(e)(2)(B)(ii) (defining "significant cause" as "a cause which contributes significantly to the material injury . . . but need not be equal to or greater than any other cause.") (language added by amendment in 1988).

42 U.S.C. § 300D-13(a)(7)(B) (distinguishing between "the cause of the injury and any factors contributing to the injury . . . .") (enacted in 1990).

10 U.S.C. § 2254(c)(1)–(2) (distinguishing between evidence sufficient to determine "the cause or causes" and factors that "substantially contributed to" military aircraft accidents) (enacted in 1992).

21 U.S.C. § 360i(a)(1)(A) (requiring manufacturers to report instances where their devices "may have caused or contributed to a death or serious injury . . . .") (language added by amendment in 1992).

19 U.S.C. § 3391(d)(2)(A) (suggesting consultations to determine whether higher peanut imports are a "substantial cause of, or contribute importantly to, serious injury . . . to the domestic peanut industry . . . .") (enacted in 1993).

49 U.S.C. § 20901(a) (allowing railroad employees who "cause[d]" an accident to explain "any factors [that] contributed to the accident . . . .") (enacted in 1994).

15 U.S.C. § 6605(b)(1)(A) (proportioning liability to the defendant's percentage of the total fault of all persons who "caused or contributed to" the total loss) (enacted in 1999).

20 U.S.C. § 1408(a)(4)(A) (terminating the waiver of statutory requirements where the waiver "has contributed to or caused" other problems) (enacted in 2004).

42 U.S.C. § 7385s-3(a)(1)(B) (determining survivor compensation where exposure to toxic substance "was a significant factor in aggravating, contributing to, or causing the death . . . .") (enacted in 2004).

21 U.S.C. § 379aa-1(g) (submission of safety report is not an admission that dietary supplement "caused or contributed to" adverse health condition) (enacted in 2006).

21 U.S.C. § 350f(m) (submission of safety report is not an admission that the food "caused or contributed to a death, serious injury, or serious illness.") (enacted in 2007).

42 U.S.C. § 17283(b)(2)(B) (requiring consideration of whether a scheduled refinery outage will affect gas prices by "causing or contributing to" a supply shortage) (enacted in 2007).

21 U.S.C. § 387i(a)(1) (requiring tobacco manufacturers to report knowledge that its products "caused or contributed to" adverse result) (enacted in 2009).

51 U.S.C. § 40114 (creating programs to develop preventative technologies "aimed at causal, contributory, or circumstantial factors of aviation accidents.") (enacted in 2010).

51 U.S.C. § 70703(2)(3) (distinguishing between "the cause" and "all contributing factors to the cause" of space flight accidents) (enacted in 2010).

42 U.S.C. § 300mm-22(a)(1)(A)(i) (defining "WTC-related health condition" to mean an illness or condition for which exposure "is substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition . . . .") (enacted in 2011).

APPENDIX B

Witherspoon v. *State*, 33 So. 3d 625, 627–28 (Ala. Crim. App. 2009) (citing "but for" language for criminal liability from Ala. Code § 13A-2-5 (1975)).

State v. *Marty*, 801 P.2d 468, 471 (Ariz. Ct. App. 1990) ("In Arizona, both 'but for' causation and proximate cause must be established in a criminal case."), *aff'd sub nom. Marty* v. *Daniels*, 978 F.2d 715 (9th Cir. 1992).

People v. *Stamp*, 2 Cal. App. 3d 203, 209 (1969) (applying "but for" test).

Eversley v. *State*, 748 So. 2d 963, 966–67 (Fla. 1999) (applying "the traditional 'but for' test . . . .").

Velazquez v. *State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990) ("Courts . . . have uniformly followed the traditional 'but for' test in determining whether the defendant's conduct was a cause-in-fact of a prohibited consequence in result-type offenses . . . .").

People v. *Hudson*, 856 N.E.2d 1078, 1083 (Ill. 2006) (holding that Illinois requires proximate cause in felony murder cases, which is composed of "two distinct requirements: cause in fact and legal cause.").

State v. *Marti*, 290 N.W.2d 570, 585 (Iowa 1980) (cause-in-fact expressed in "but for" terms).

Robertson v. *Commonwealth*, 82 S.W.3d 832, 836 (Ky. 2002) (finding "but for" causation).

State v. *Phillips*, 514 So. 2d 743, 745–46 (La. Ct. App. 1987) (adopting the "but for" test).

State v. *Crocker*, 431 A.2d 1323, 1325 (Me. 1981) (upholding a "but for" standard of causation in criminal cases).

People v. *Feezel*, 783 N.W.2d 67, 74 (Mich. 2010) (holding that the term "cause" requires both factual or "but for" cause and proximate cause).

State v. *William*, 435 N.W.2d 174, 177 (Neb. 1989) (requiring "but for" and proximate cause for felony murder).

State v. *Marshall*, 34 A.3d 540, 544 (N.H. 2011) (adopting "but for" and proximate cause as the standard for drug-related crimes resulting in death).

State v. *Montoya*, 61 P.3d 793 (N.M. 2002) (requiring "but for" causation).

State v. *Bingaman*, 655 N.W.2d 51, 56 (N.D. 2002) (adopting a "but for" standard).

State v. *Lovelace*, 738 N.E.2d 418, 425 (Ohio Ct. App. 1999) (cause-in-fact is determined by the "but for" test).

Commonwealth v. *Rementer*, 598 A.2d 1300, 1305 (Pa. Super. Ct. 1991) (factual cause determined by "but for" test).

Robbins v. *State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986) (en banc) (requiring "but for" causal connection).

State v. *Hallett*, 619 P.2d 335, 338–39 (Utah 1980) ("but for" test is "uniformly recognized" aspect of causation).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 8 - 2013
OFFICE OF THE CLERK

No. 12-7515

In The Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF ALASKA, COLORADO, HAWAI'I, KANSAS, NEW MEXICO, SOUTH DAKOTA, TENNESSEE, WISCONSIN AND WYOMING IN SUPPORT OF RESPONDENT

MICHAEL C. GERAGHTY
Attorney General of Alaska
RICHARD SVOBODNY
Deputy Attorney General
ERIC A. JOHNSON*
Special Assistant
Attorney General
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600
ejohnsn@illinois.edu

*Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

DAVID M. LOUIE
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813

DEREK SCHMIDT
Attorney General of Kansas
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612

GARY K. KING
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504

MARTY J. JACKLEY
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501

ROBERT E. COOPER, JR.
Attorney General of Tennessee
425 5th Avenue North
Nashville, Tennessee 37243

J.B. VAN HOLLEN
Wisconsin Attorney General
P.O. Box 7857
Madison, Wisconsin 53707

PETER K. MICHAEL
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Amici address only the second of the two questions on which this Court granted review, namely:

> In cases like this one, where the defendant's conduct contributes to the causal mechanism underlying the victim's death but is potentially superfluous, does 21 U.S.C. § 841(b)(1)(C) require by way of factual causation that the defendant's conduct be "independently" sufficient to cause the victim's death?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Criminal Law Does Not Require But-For Causation In Cases Of Causal Overdetermination	5
II. In Cases Of Causal Overdetermination, The Criminal Law Does Not Require That The Defendant's Conduct Be "Independently" Sufficient To Bring About The Result	11
III. In Cases Of Causal Overdetermination, The Criminal Law Requires The Government To Prove That The Defendant's Conduct Contributed To A Causal Mechanism That Was A Cause Of The Proscribed Result	20
IV. This Court Should Leave For Future Cases The Question Whether The Criminal Law Requires Something Else In Addition To Contribution	27
CONCLUSION	32

TABLE OF AUTHORITIES

Page

CASES:

Armstrong v. State, 502 P.2d 440 (Alaska 1972) 24, 29

Boeing Co. v. Cascade Corp., 207 F.3d 1177 (9th Cir. 2000) 3, 6

Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985).....24

Commonwealth v. McLeod, 477 N.E.2d 972 (Mass. 1985) 9, 15

Commonwealth v. Osachuk, 681 N.E.2d 292 (Mass. App. 1997).....8, 13, 15, 22

Grayer v. State, 647 S.E.2d 264 (Ga. 2007) 22

Neder v. United States, 527 U.S. 1 (1999) 31

People v. Bailey, 549 N.W.2d 325 (Mich. 1996) 8, 15, 21

People v. Caldwell, 681 P.2d 274 (Cal. 1984).....19

People v. Hoerer, 872 N.E.2d 572 (Ill. App. 2007) 22

People v. Jennings, 237 P.3d 474 (Cal. 2010).....*passim*

People v. Lewis, 57 P. 470 (Cal. 1899) 20, 21, 25, 26

People v. Wells, 355 N.W.2d 105 (Mich. 1984) 19, 30

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....3, 4, 6, 13

State v. Burton, 370 S.W.3d 926 (Mo. App. 2012) 10

State v. Christman, 249 P.3d 680 (Wash. App. 2011) 8, 15, 19, 22

TABLE OF AUTHORITIES – Continued

Page

State v. David, 141 P.3d 646 (Wash. App. 2006).....1, 7

State v. Montoya, 61 P.3d 793 (N.M. 2002)....11, 23, 24

State v. Shane, No. A06-1581, 2008 WL 660543 (Minn. App. 2008).....23

State v. Woods, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005) 8, 15, 21

United States v. Monnier, 412 F.3d 859 (8th Cir. 2005) 2

Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013).....6

STATUTES:

21 U.S.C. § 841(b)(1)(C).....2, 3, 4, 10

Ala. Code § 13A-2-5(a).....7, 8, 15, 28

Ark. Code § 5-2-205 .....7, 8, 15, 16, 28

17-A Me. Rev. Stat. § 33.....5, 7, 8, 15, 28

N.D. Cent. Code § 12.1-02-05.....7, 8, 15, 28

Tex. Penal Code § 6.04.....7, 8, 16, 28

OTHER AUTHORITIES:

Black's Law Dictionary (7th ed. 1999).....19

Final Report of the National Commission on Reform of Criminal Laws (1971).....*passim*

Eric Funkhauser, *Three Varieties of Causal Over-determination*, 83 Pac. Phil. Q. 335 (2002) 3

TABLE OF AUTHORITIES – Continued

Page

H.L.A. Hart & Tony Honoré, *Causation in the Law* (2d ed. 1985) 6, 12, 25

Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59 (2005) 15, 22, 24, 26, 29

Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* (1987) 28

Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345 7

W. Page Keeton et al., *Prosser and Keeton on Torts* (5th ed. 1984) 9, 14, 17, 18, 27

Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) ..... *passim*

John Stuart Mill, *System of Logic* (8th ed. 1974) 12

Model Penal Code & Commentaries (1985) 1, 6, 7, 10

Michael S. Moore, *Act and Crime* (1993) 13

Michael S. Moore, *Causation and Responsibility* (2009) 6

Oxford English Dictionary (2d ed. 1989) 25

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3d ed. 1982) 19, 20, 30

Restatement (Third) of Torts (2010) ..... *passim*

Jonathan Schaffer, *Overdetermining Causes*, 114 Phil. Studies 23 (2003) 6

Jane Stapleton, *Unnecessary Causes*, 129 L. Q. Rev. 39 (2013) 15, 25, 26

INTEREST OF AMICI CURIAE

Like the federal criminal code, state criminal codes include a variety of offenses that require the government to prove a causal relationship between an actor's conduct and a proscribed result. And like the federal criminal code, most state criminal codes include no general provision defining this required causal relationship. *See* Model Penal Code & Commentaries § 2.03 cmt. 5 (1985) ("In the majority of jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included. . . ."). Accordingly, in giving content to statutory causation requirements, state courts often draw on the same body of judge-made criminal law doctrine as do federal courts. *See, e.g., State v. David*, 141 P.3d 646, 649-52 (Wash. App. 2006). As the states' chief law enforcement officers, the amici have a strong interest in fostering the development of just and workable criminal law doctrine on the subject of causation.

STATEMENT OF THE CASE

Petitioner Marcus Burrage sold heroin to Joseph Banka, who died of "mixed drug intoxication" shortly after injecting it. J.A. 100, 105-08, 157. Several different drugs (or their metabolites) were present in Banka's system when he died, including heroin, oxycodone, clonazepam, and alprazolam. J.A. 157, 193. Though all of these drugs but the heroin were

present only at therapeutic levels, all of them contributed – by depressing Banka's central nervous system – to the causal mechanism behind Banka's death. J.A. 153, 157, 193-95. As a result, neither the pathologist who performed the autopsy nor the toxicologist who tested Banka's blood could say that Banka would not have died "but for" his use of the heroin supplied by Burrage. J.A. 159, 208. Instead, they could say only that the heroin was a "contributing factor." J.A. 158, 199.

For his role in Banka's death, the government charged Burrage under 21 U.S.C. § 841(b)(1)(C), which imposes an enhanced sentence on a heroin dealer "if death or serious bodily injury results from the use of such substance." J.A. 41. At Burrage's trial (on this and another, separate charge), defense counsel proposed a jury instruction that would have required the government to prove, among other things, that the heroin supplied by Burrage was a but-for cause of Banka's death. J.A. 238. Specifically, the instruction would have required the government to prove that "except for [Burrage's conduct] the death would not have occurred." J.A. 238. The district court declined so to instruct the jury. J.A. 222. Instead, the court instructed the jury – in keeping with *United States v. Monnier*, 412 F.3d 859 (8th Cir. 2005) – that the government was required to prove that the heroin supplied by Burrage "was a contributing cause." J.A. 242. The jury convicted Burrage. J.A. 40.

On appeal, Burrage argued, among other things, that the district court had erred in its instructions to

the jury on the question of factual causation. J.A. 59. The Court of Appeals for the Eighth Circuit affirmed Burrage's conviction. The court of appeals concluded, first, that an event need merely be a "contributing cause" to satisfy the causation requirement in 21 U.S.C. § 841(b)(1)(C), and, second, that the testimonies of the pathologist and the toxicologist were sufficient to sustain the verdict. J.A. 60, 65-66.

SUMMARY OF ARGUMENT

Burrage's case is an instance of what courts and commentators call "causal overdetermination." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); Eric Funkhauser, *Three Varieties of Causal Overdetermination*, 83 Pac. Phil. Q. 335, 340 (2002). The evidence at Burrage's trial left no doubt either about the causal mechanism behind Banka's death or about whether the heroin supplied by Burrage had contributed to this causal mechanism. J.A. 153, 157, 193-95. At the same time, though, the evidence at trial suggested that the heroin's contribution to this causal mechanism – like every other individual contribution – might conceivably have been superfluous. J.A. 159, 208. The possible superfluity of each of the individual contributions to Banka's death makes this a case of causal overdetermination. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1185 (9th Cir. 2000).

That Burrage's case is an instance of causal overdetermination bears on the second of the two questions before this Court, namely: What did 21 U.S.C. § 841(b)(1)(C) require in Burrage's case by way of factual (as distinct from legal or proximate) cause? On this question, the amici will make four points:

1. Though the "but-for" test is the correct test of factual causation in most criminal cases, cases of causal overdetermination require an alternative test. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b) at 468-69 (2d ed. 2003). In cases like Burrage's, where each of the individual factors that contributes to the causal mechanism behind the proscribed result also is potentially superfluous, application of the but-for test would lead to the absurd conclusion that the result "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241.

2. The alternative test applicable in cases of causal overdetermination does not, as Burrage claims, require that the defendant's conduct be "independently" sufficient to cause the proscribed result. Pet. Br. 17-18, 29-34. Though commentators occasionally posit independently sufficient conduct in constructing illustrations of causal overdetermination, the tests formulated by these commentators – like the tests applied by the courts – are broad enough to encompass cases where "an actor's conduct requires other conduct to be sufficient to cause another's harm." Restatement (Third) of Torts § 27 cmt. f (2010).

3. What the criminal law requires instead is that the defendant's conduct contribute to, or complement, a causal mechanism that in the aggregate is a cause of the proscribed result. This contribution test finds strong support both (a) in criminal statutes that address the problem of causal overdetermination explicitly; and (b) in cases from jurisdictions where the legislature has, like Congress, left the question to the courts. *See, e.g.*, 17-A Me. Rev. Stat. § 33; *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010).

4. This Court should leave for future cases the question whether the law requires something else in addition to contribution. Some versions of the contribution test impose an additional requirement. For example, under some state statutes it is a condition of liability that the *other* concurrent causal factors were not "clearly sufficient" by themselves to cause the result. *See, e.g.*, 17-A Me. Rev. Stat. § 33. But Burrage has not addressed the question whether the contribution test requires this or any other added condition. And neither this nor any other added condition would have made a difference in Burrage's case.

ARGUMENT

I. The Criminal Law Does Not Require But-For Causation In Cases Of Causal Overdetermination.

"In the usual course," the question of factual causation hinges on whether "the harm would not

have occurred in the absence of – that is, but for -- the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2525 (2013) (internal quotation marks omitted). Everyone agrees, however, that the defendant's conduct sometimes will count as a factual cause "even though [it is] not a but-for cause." LaFave, *supra*, § 6.4(b) at 468-69; *see also Price Waterhouse*, 490 U.S. at 241; Model Penal Code, *supra*, § 2.03 cmt. 2. More specifically, everyone agrees that the but-for test does not deliver the right answer in cases of so-called "causal overdetermination." *Price Waterhouse*, 490 U.S. at 241; *see also* Michael S. Moore, *Causation and Responsibility* 86 (2009).

To illustrate: Suppose that "two assailants without preconcert attack their victim with intent to kill, and death results because each has simultaneously struck a mortal blow." Model Penal Code, *supra*, § 2.03 cmt. 2. Because either of the two assaults would have brought about the death, neither really is necessary. Neither is a but-for cause, in other words. It would be absurd, however, to conclude that the victim's death in this case "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241; *see also Boeing Co. v. Cascade Corp.*, 207 F.3d at 1185; Jonathan Schaffer, *Overdetermining Causes*, 114 Phil. Studies 23, 24 (2003). In cases like this, then, "there are good reasons both for saying that some given event was caused by some action and also that it would have happened without this action." H.L.A.

Hart & Tony Honoré, *Causation in the Law* 123 (2d ed. 1985).

The but-for test's inadequacy in cases of causal overdetermination is widely recognized. *See* LaFave, *supra*, § 6.4(b) at 468-69. Where causal overdetermination is concerned, the jurisdictions can be divided roughly into two groups. In the first group are jurisdictions where the legislature has adopted a criminal statute that addresses the question of causal overdetermination explicitly. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. In the second group are jurisdictions where the question of causal overdetermination has essentially been "left to judicial development." Model Penal Code, *supra*, § 2.03 cmt. 5 (describing the effect of an incompletely specified definition of causation); *see also State v. David*, 141 P.3d 646, 649-52 (Wash. App. 2006) (noting that the state legislature "has historically left to the judiciary the task of defining some criminal elements," including causation); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 372 (arguing that the effect of "incompletely specified criminal statutes" is a tacit delegation of lawmaking authority from the legislature to the courts).

Of the state criminal codes that address the problem of causal overdetermination explicitly, all adopt an alternative to the but-for test for cases "in which two or more factors 'cause' the result." *See Final Report of the National Commission on Reform*

of Criminal Laws § 305 cmt. at 32 (1971) (describing the provision from which the state statutes are derived). Specifically, these codes adopt a "modified 'but for' test," *id.*, under which the fact finder is permitted to combine the defendant's conduct with another causal factor before applying the but-for test. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. Maine's statute, for example, says that "causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone *or concurrently with another cause*, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient." 17-A Me. Rev. Stat. § 33 (emphasis added).

Courts have adopted roughly the same test in states where the legislature has, like Congress, left causation doctrine to judicial development. *See, e.g.*, *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997); *People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996); *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005); *State v. Christman*, 249 P.3d 680, 687 (Wash. App. 2011). In California, for example, the state supreme court has recognized that the but-for test, if applied in cases of causal overdetermination, "would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." *Jennings*,

237 P.3d at 496 (quoting W. Page Keeton et al., *Prosser and Keeton on Torts*, § 41 at 266 (5th ed. 1984)). Accordingly, the court has held, as have other courts, that a defendant's conduct will qualify as a factual cause of the harm if (1) the defendant's conduct "was operative at the moment of the [result] and acted with another cause to produce the [result]"; and (2) the conduct's causal role was not "insignificant or merely theoretical." *Id.*; *see also Commonwealth v. McLeod*, 477 N.E.2d 972, 985 n.21 (Mass. 1985).

Tort law, too, reflects widespread recognition of the but-for test's inadequacy in cases of causal overdetermination. The Restatement (Third) of Torts, for example, adopts an alternative test of causation for cases of "overdetermined harm." Restatement (Third) of Torts, *supra*, § 27 cmt. b. Under this test, a defendant's conduct, though not a but-for cause, still will qualify as a factual cause if the conduct, either by itself or in combination with the conduct of one or more other actors, would have been "sufficient" to cause the harm. *Id.* § 27 & cmt. f. Likewise, Prosser's treatise espouses an alternative to the but-for test that is satisfied where "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them." W. Page Keeton et al., *Prosser and Keeton on Torts* § 41 at 268 (5th ed. 1984).

Burrage's is a criminal case, of course, not a tort case. But tort law nevertheless bears on the question

what 21 U.S.C. § 841(b)(1)(C) requires by way of factual causation in this case. Tort and criminal law sometimes differ in how they resolve the policy-driven question whether a particular factual cause *also* qualifies as a legal or proximate cause. LaFave, *supra*, § 6.4(c) at 471-72. But criminal law and tort do not appear to differ in how they resolve, in the first instance, the question whether a particular event qualifies as a factual cause. *See id.* § 6.4(c) at 471 n.32 ("As to causation-in-fact, the two situations [tort and criminal cases] are exactly alike. . . ."); *see also People v. Jennings*, 237 P.3d 474, 496 n.3 (Cal. 2010) ("It is well established that the principles of causation, as they apply to tort law, are equally applicable to criminal law."); *State v. Burton*, 370 S.W.3d 926, 931 n.3 (Mo. App. 2012) ("We note that actual causation, or causation in fact, is the same analytically in criminal law and tort law.").

In short, "[a]ll who have considered the issue agree," at least with respect to the basic question whether the requirement of factual causation sometimes is satisfied in cases of causal overdetermination. Model Penal Code, *supra*, § 2.03 cmt. 2. Everyone agrees, in other words, that the requirement of factual causation sometimes is satisfied in cases where, by virtue of the causal sufficiency of other actors' contributions, the defendant's contribution was or might have been unnecessary.

II. In Cases Of Causal Overdetermination, The Criminal Law Does Not Require That The Defendant's Conduct Be "Independently" Sufficient To Bring About The Result.

Burrage was wrong, then, when he proposed a jury instruction that would have required but-for causation. J.A. 238. But Burrage also is wrong when he asserts in his brief to this Court that the law requires, in cases of causal overdetermination, that the defendant's conduct be "independently" sufficient to bring about the harm. Pet. Br. 17-18, 29-34. Burrage cites not a single case that applies this requirement of "independent[ ]" sufficiency.[1] Nor does he cite a single statute that adopts this test. And, indeed, all of the law is against him. Neither tort nor criminal law imposes a requirement that an overdetermining cause be "independently" sufficient.[2]

---

[1] *See* Pet. Br. 17-18 n.9. The closest Burrage comes to citing case-law precedent for his view is his passing reference to *State v. Montoya*, 61 P.3d 793 (N.M. 2002). Pet. Br. 17 n.8. In *Montoya*, unbeknown to Burrage, the court *did* suggest that a defendant's conduct, if not a but-for cause, must be "alone sufficient" to cause the harm. *Montoya*, 61 P.3d at 799. But, as explained in Section IV, *infra*, the court in *Montoya* upheld the defendant's murder conviction despite the fact that the defendant's kidnapping of the victim was neither necessary nor independently sufficient to bring about the victim's death.

[2] Though amici will indulge, with Burrage, in using the term "independently" sufficient, even this term is problematic. An actor's conduct never really is "independently" sufficient to cause a result. What is *sufficient* to cause a result is "not a

(Continued on following page)

a. To begin with, intuitions about the but-for test's inadequacy are not confined to cases where the actor's conduct was sufficient by itself to cause the harm. Exactly the same intuitions arise in cases where "an actor's conduct requires other conduct to be sufficient to cause another's harm." Restatement (Third) of Torts, *supra*, § 27 cmt. f. The Restatement uses a hypothetical case to illustrate this point:

> Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the end of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the

---

single condition, but a set of conditions." Hart & Honoré, *supra*, at 19. Though we might be tempted to say that a smoker's disposal of a cigarette butt was "independently" sufficient to cause a resulting forest fire, the fire actually depended causally on a number of other conditions as well, including the presence of oxygen in the air and combustible materials on the forest floor. *Id.*; *see also* John Stuart Mill, *System of Logic*, bk. III, ch. V, § 3, at 241 (8th ed. 1974). What Burrage appears to mean by "independently" sufficient is that the actor's conduct was sufficient in combination with background conditions – like the tinder on the forest floor – to bring about the harm. And so his proposed test hinges on an undefended, and perhaps indefensible, distinction between background and non-background conditions.

> curbstone, but the combined force of any two of them is sufficient.

Id. § 27 cmt. f, ill. 3. In this case, no less than in a case where two assailants independently inflict mortal wounds, it would be absurd to conclude that the harm "may not have any 'cause' at all." *Price Waterhouse*, 490 U.S. at 241. Our intuition, rather, is that "Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car." Restatement (Third) of Torts, *supra*, § 27 cmt. f.[3]

Tort and criminal law both are in keeping with this intuition. Under the Restatement test, for example, the question whether an actor's conduct qualifies

---

[3] The absurdity of Burrage's position is even clearer in cases where the defendant himself performs several distinct acts, each of which contributes to the proscribed result but none of which is "independently" sufficient to bring about the result. Take, for example, *Commonwealth v. Osachuk*, 681 N.E.2d 292, 293-94 (Mass. App. 1997), where the victim's death from drug intoxication was attributable to the combined effects of three separate acts by the defendant: (1) his act of giving the victim methadone tablets; (2) his later act of giving the victim money to purchase cocaine and heroin; and (3) his still-later act of injecting the victim with additional cocaine. If the law were to require that an overdetermining cause be "independently" sufficient to bring about the harm, the court in *Osachuk* would have had to conclude, absurdly, that the defendant had not caused the victim's death. After all, in criminal law as in tort, the question of causation is resolved in relation to a particular act, not in relation to a series of acts. *See* Michael S. Moore, *Act and Crime* 35-36 (1993) (explaining that all the conditions of criminal liability, including causation, must be proved in relation to a specific "voluntary act").

as a factual cause does not hinge on whether the actor's conduct is sufficient by itself to bring about the harm. The question hinges, rather, on whether it is possible, by subtracting some "other act(s)," to construct a counterfactual universe in which the actor's conduct is a necessary element of a "sufficient causal set." Restatement (Third) of Torts, *supra*, § 27 & cmt. f. In the parked-car hypothetical, for example, the Restatement would permit the finder of fact to subtract counterfactually the conduct of *one* of the three actors, leaving a "sufficient causal set" consisting of (1) the defendant's contribution and (2) the contribution of one but not the other remaining actor. *Id.* cmt. f. Of this sufficient causal set, the defendant's conduct is a necessary element. So "Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car." *Id.*

The same thing is true under Prosser's test for cases of causal overdetermination. Keeton et al., *supra*, § 41 at 268. Prosser's test differs from the standard but-for test in that it poses the question of causal necessity not in relation to the defendant's conduct alone, but in relation to the "combined conduct" of two or more actors. *Id.* Under Prosser's test, each of the three actors in the parked-car hypothetical -- Able, Baker, and Charlie – would count as a cause of the car's destruction, because their "combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them." *Id.* The fact that no single actor's conduct was independently

sufficient is beside the point. *Cf.* Jane Stapleton, *Unnecessary Causes*, 129 L. Q. Rev. 39, 60 (2013) ("There is no reason to think courts would take a different view in cases where the defendant's tortious contribution was not only unnecessary for the threshold to have been reached but was also insufficient for it to be reached. . . .").

The criminal law of the states reflects the same view. In states where the legislature has, like Congress, left the development of causation doctrine to the courts, the courts have not required the government to prove that defendant's acts were "themselves wholly sufficient" to cause the harm. *Commonwealth v. McLeod*, 477 N.E.2d 972, 985 (Mass. 1985). What they have required instead is roughly what Prosser requires, namely, proof that the defendant's conduct contributed to a causal mechanism that, in the aggregate, was a but-for cause of the harm. *See, e.g., People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997); *People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996); *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005); *State v. Christman*, 249 P.3d 680, 687 (Wash. App. 2011). *See generally* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 Iowa L. Rev. 59, 66-86 (2005).

Much the same rule is applied in states where the legislature has addressed the causal-overdetermination problem by statute. *See* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent.

Code § 12.1-02-05; Tex. Penal Code § 6.04. Arkansas's statute, for example, provides:

> Causation may be found when the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless:
>
> (1) the concurrent cause was clearly sufficient to produce the result; and
>
> (2) the conduct of the defendant was clearly insufficient to produce the result.

Ark. Code § 5-2-205. This statute, like the others, does not require that the defendant's conduct be sufficient by itself to cause the harm. It requires, first, that the defendant's conduct contribute to a causal mechanism that is a but-for cause. And it requires, second, that the defendant's contribution *might* potentially have made a difference to the outcome.[4]

Congress, of course, has not adopted this or any other statutory language on the question of causal overdetermination. But these state statutes are nevertheless telling. Each of the statutes was modeled closely on Section 305 of the Brown Commission's 1971 draft federal criminal code. *See Final Report of the National Commission on Reform of Criminal Laws*, *supra*, § 305. Section 305 – on the

---

[4] This second statutory component is analyzed in greater detail in Section IV, *infra*.

"causal relationship between conduct and results" – was one of several code provisions addressed to "basic conditions of liability" and designed to "make the treatment and understanding of these issues clear and uniform." *Id.* § 301 cmt. at 27. Thus, the section does not appear to have been intended to work a change in existing law on the subject. Rather, it appears to have been intended merely to make existing law "clear and uniform." *Id.* At bottom, the state statutes modeled on the Brown Commission report are just another reflection, albeit indirect, of the substantive background principles at work in the judge-made criminal law.

b. In support of his sufficient-by-itself test, Burrage does not cite statutes or cases. Instead, Burrage seizes on the fact that commentators, in constructing illustrations of causal overdetermination, sometimes posit conduct – both by the defendant and by the other actor – that is sufficient by itself to cause the harm. *See* Keeton et al., *supra*, § 41 at 266; LaFave, *supra*, § 6.4 at 468. But Burrage misinterprets these commentators. Though they do posit conduct "sufficient by itself" in constructing illustrations of causal overdetermination, they do not require conduct sufficient by itself when, finally, they formulate the rule applied in cases of causal

overdetermination. *See* Keeton et al., *supra*, § 41 at 266, 268; LaFave, *supra*, § 6.4 at 468.[5]

Take Professor LaFave, for example. Professor LaFave's illustration of causal overdetermination posits two simultaneous assaults, each of which "inflict[s] a fatal wound." LaFave, *supra*, § 6.4. at 468. When he formulates the rule applied in cases of causal overdetermination, however, Professor LaFave does not impose a sufficiency requirement. According to Professor LaFave, the question in these cases is simply: "Was the defendant's conduct a substantial factor in bringing about the forbidden result?" *Id.* at 479.

The phrase "substantial factor" does not, of course, mean "sufficient by itself to bring about the

---

[5] Burrage's argument misreads the reason why commentators posit conduct sufficient by itself in constructing illustrations of causal overdetermination. Illustrations like LaFave's are designed to show that cases arise where (1) the defendant's conduct fails to satisfy the but-for test; but (2) his conduct nevertheless seems intuitively to qualify as a cause. LaFave, *supra*, § 6.4 at 468. The sufficient-by-itself stipulation bears on the first, not the second, feature of these cases. In other words, in causal-overdetermination scenarios involving two actors, what makes each actor's conduct unnecessary – what makes it less than a but-for cause – is the fact that the conduct of the *other* actor would have been "sufficient by itself" to produce the same result. Keeton et al., *supra*, § 41 at 268. There is no reason to suppose, then, that the sufficient-by-itself stipulation bears on the second feature of these illustrations. There is no reason to suppose, in other words, that the sufficient-by-itself stipulation is what drives the critical intuition that the defendant's conduct ought to qualify as a factual cause.

result." Rather, a "substantial factor" simply is "an important or significant contributor" to the proscribed result, *Black's Law Dictionary* 1442-43 (7th ed. 1999), as distinguished from an "infinitesimal" or "theoretical" contributor. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 781 (3d ed. 1982); *see also People v. Caldwell*, 681 P.2d 274, 280 (Cal. 1984); *People v. Wells*, 355 N.W.2d 105, 107 (Mich. 1984) (Levin, J., dissenting). Professors Perkins and Boyce explain this point in their criminal law treatise:

> If a man bleeds to death from two wounds inflicted by different persons, acting quite independently, "both may properly be said to have contributed to his death." If at the moment of death both injuries were substantially contributing thereto, the "law does not measure the effects of the several injuries in order to determine which is the more serious and which contributed in greater measure to bring about the death," but imputes the loss of life to both. But suppose one wound severed the jugular vein whereas the other barely broke the skin on the hand, and as the life blood gushed from the victim's neck, one drop oozed from the bruise on his finger. . . . [T]he law will apply the *substantial factor* test and for juridical purposes the death will be imputed only to the severe injury in such an extreme case as this.

Perkins & Boyce, *supra*, at 779 (footnotes omitted); *see also Christman*, 249 P.3d at 687 ("Under the

substantial factor test, all parties whose actions contributed to the outcome are liable.").

In summary, Burrage's proposed sufficient-by-itself requirement is without support in the criminal law.

III. In Cases Of Causal Overdetermination, The Criminal Law Requires The Government To Prove That The Defendant's Conduct Contributed To A Causal Mechanism That Was A Cause Of The Proscribed Result.

The criminal law does not, then, require "but for" causation in cases of causal overdetermination. Nor does it require proof that the defendant's conduct was sufficient by itself to cause the proscribed result. What it requires, primarily if not exclusively,[6] is that the defendant's conduct make a positive incremental contribution to a causal mechanism that, in the aggregate, is a but-for cause of the proscribed result.

Courts have applied this contribution requirement, for example, in cases where "a man bleeds to death from two wounds inflicted by different persons, acting quite independently." Perkins & Boyce, *supra*, at 781. In the seminal case, *People v. Lewis*, 57 P. 470 (Cal. 1899), the victim bled to death from two

---

[6] The question whether the criminal law requires something else, in addition to contribution, is addressed in Section IV, *infra*.

wounds: a gunshot wound inflicted by defendant Lewis and a "ghastly" knife wound inflicted independently by the defendant's son. *Id.* at 471. In concluding that the gunshot wound inflicted by the defendant was a cause of death, the California Supreme Court said that the critical question was whether "the wound inflicted by the defendant did contribute to the event." *Id.* at 473. The critical question, in other words, was whether the wound inflicted by the defendant had made a positive contribution to a causal mechanism – blood loss – that in the aggregate was a but-for cause of death. It had, according to the court: "Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event." *Id.*

In other settings too, courts have imposed criminal liability after concluding that the defendant's conduct "contributed" to the causal mechanism behind the victim's death. Take, for example, *State v. Woods*, No. W2003-02762-CCA-R3-CD, 2005 WL 396382 (Tenn. Crim. App. 2005), where the blunt-force injuries inflicted by the defendant contributed, along with injuries inflicted by others, to the victim's death from blunt-force trauma. Under these circumstances, said the appellate court, the government was required to show only that "'but for' the acts of all, death would not have occurred." *Id.* at **4-5; *see also People v. Bailey*, 549 N.W.2d 325, 334-36 (Mich. 1996).

Likewise, in cases where the defendant supplied one of several substances that contributed to the

victim's death from intoxication, the courts have required the government to show only that the defendant's conduct "contributed to the outcome." *State v. Christman*, 249 P.3d 680, 687-88 (Wash. App. 2011); *see also People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010) (applying contribution test where defendant's physical abuse of the victim contributed, by weakening him, to his death from "combined drug toxicity"); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. 1997) (applying contribution test where drugs supplied by the defendant on each of three different occasions contributed to the victim's death from combined "cocaine, heroin, and methadone intoxication").

Cases where courts explicitly have applied this "contribution" test are just the tip of an iceberg, however. In a large number of other criminal cases, courts have reached identical results by asking, instead, whether a homicide defendant's conduct deprived the victim of a "chance" of surviving some other causal factor – usually an illness or injury. Johnson, *supra*, 91 Iowa L. Rev. at 61 n.3 (listing cases); *see also Grayer v. State*, 647 S.E.2d 264, 268 (Ga. 2007) (upholding defendant's conviction for murder after concluding that but for the defendant's failure to seek medical care for the infant victim, "the baby might have survived"); *People v. Hoerer*, 872 N.E.2d 572, 574, 579 (Ill. App. 2007) (upholding defendant's conviction for involuntary manslaughter after concluding that but for the defendant's efforts to prevent his friends from summoning assistance for

the victim, the victim "might have survived" the methadone overdose that killed her); *State v. Shane*, No. A06-1581, 2008 WL 660543 at *3 (Minn. App. 2008) (upholding defendant's conviction for second-degree murder after concluding that the defendant's failure to seek prompt medical assistance for her infant daughter had deprived the daughter of "between a two and ten percent chance of survival").

Consider, for example, *State v. Montoya*, 61 P.3d 793 (N.M. 2002), where Adam Montoya was charged with murder for his role in the death of Ty Lowery. Lowery died from a gunshot wound, but Montoya himself did not shoot Lowery, nor was he implicated in the shooting as an accomplice. Rather, shortly after the shooting, he kidnapped the injured Lowery and drove him to a nearby river, where he left him to die. At Montoya's trial, the state's pathologist could not testify that Montoya's actions were a but-for cause of Lowery's death. He acknowledged that "he thought it was still more than likely that the victim would have died even if he would have been taken to the hospital." *Id.* at 796. But the pathologist testified "there was 'some chance' that immediate medical attention could have prevented the victim's death." *Id.* In upholding Montoya's conviction, the court said it was enough that Montoya had deprived Lowery of this chance of survival: "This evidence permits a finding that the victim was not put on an unalterable course of death once he had been shot. Immediate medical intervention could possibly have saved his life." *Id.*

Decisions like *Montoya* obviously cannot be explained by the but-for test. In these cases, the government's evidence at best shows that, but for the defendant's wrongdoing, the victim *might* have survived the injury or illness that killed him. The evidence does not show that he *would* have survived, and so it does not satisfy the but-for test. The evidence in these cases does satisfy the contribution test, however. In *Montoya*, for example, the defendant's kidnapping of the victim complemented the victim's gunshot wound by depriving the victim of medical care that would have stopped the bleeding. *Montoya*, 61 P.3d at 796; *see also* Johnson, *supra*, 91 Iowa L. Rev. at 78. Because the kidnapping of the victim made a positive contribution to the causal mechanism that brought about the victim's death – namely, blood loss – it counts as a cause under the contribution test, quite apart from whether the victim might have died anyway.

Admittedly, the courts in these lost-chance cases have not consciously formulated an alternative to the but-for test. Johnson, *supra*, 91 Iowa L. Rev. at 64. On the contrary, in many of these cases the courts appear to have assumed that they were applying the but-for test as they had always done. *See, e.g., Armstrong v. State*, 502 P.2d 440, 446 n.2 (Alaska 1972); *Montoya*, 61 P.3d at 799-800; *Commonwealth v. Barnhart*, 497 A.2d 616, 626 (Pa. Super. Ct. 1985). Still, these cases matter. That courts scattered around the country have arrived independently at the same rough formula for resolving questions of causal overdetermination

bespeaks the strength of the intuitions underlying that formula. Those intuitions, in turn, bear on the interpretation of criminal statutes in jurisdictions where the legislature has left the development of causation doctrine to the courts. As Hart and Honoré said: "[I]t is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned." Hart & Honoré, *supra*, at 1.

Burrage is wrong, moreover, when he implies that the contribution test would lead somehow to a "limitless extrapolation of liability." Pet. Br. 36. Under the contribution test, the fact finder is permitted to "combine" the defendant's conduct with another causal factor only if the two are complementary – only if both *contribute* to the same causal mechanism, in other words. *See* 3 *Oxford English Dictionary* 848 (2d ed. 1989) (defining "contribute" as "[t]o give or pay jointly with others; to furnish to a common fund or charge"). In *Lewis*, for example, the victim's two wounds – the gunshot wound inflicted by Lewis and the knife wound inflicted by Lewis's son – both contributed to the same causal "fund." They complemented one another. *See* Stapleton, *supra*, 129 L. Q. Rev. at 47 (arguing that liability may be assigned on the basis of the "combined" conduct's causal role if the result depends causally on "a threshold amount of some element" and the defendant's conduct makes "a positive contribution to the total amount of that element present").

By contrast, the finder of fact would not be permitted to "combine" two or more acts that lacked

this complementary or contributory relationship. To illustrate: Suppose that each of two would-be assassins independently fires a single bullet at an unknowing victim, and that one of the two bullets – no one knows whose – strikes the victim. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78. In this hypothetical, no one would argue that the conduct of the two shooters could be "combined" or aggregated, for neither shooter contributed to the likelihood that the other's bullet would strike the victim. Neither shooter *complemented* the danger posed by the other. *Id.*; *see also* Stapleton, *supra*, 129 L. Q. Rev. at 40.

Finally, then, the district court did not err in using the word "contribute" in its instructions to the jury. Pet. Br. 33-34; J.A. 242. The word "contribute" captures better than any other the critical idea at work in the overdetermination cases. *See* Stapleton, *supra*, 129 L. Q. Rev. at 45. It captures, first, the idea at work in cases like *Lewis*, where the courts explicitly have required a showing that the defendant's actions "contributed" to the causal mechanism behind the harm. *Lewis*, 57 P. at 473. But it also captures the essential idea at work in the lost-chance homicide cases, where courts have required a showing that the defendant's conduct, by contributing to the operation of some other causal factor, deprived the victim of a chance of surviving it. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78, 106 (identifying complementary relationship between defendant's conduct and other causal factor as critical element of lost-chance liability).

IV. This Court Should Leave For Future Cases The Question Whether The Criminal Law Requires Something Else In Addition To Contribution.

This Court should leave for future cases the question whether factual causation requires something else in addition to contribution. As explained below, some versions of the contribution test impose a secondary requirement designed to foreclose liability where the defendant's conduct makes only a trifling or insubstantial contribution to the result.[7] But Burrage has not invoked any of these requirements; instead, he has staked everything on his claim that an overdetermining cause must be sufficient in itself to cause the harm. Pet. Br. 17-18, 29-35. Moreover, none of these secondary requirements would have made a difference in the outcome of Burrage's trial.

In cases of causal overdetermination, again, the criminal law requires that the defendant's conduct contribute to a causal mechanism that, in the aggregate, is a but-for cause of the harm. But most courts and commentators appear to require something more as well. Though these additional, secondary

---

[7] These secondary requirements traditionally have been treated as an aspect of factual causation, rather than of proximate or legal causation. *See* LaFave, *supra*, § 6.4(b) (treating "substantial factor" requirement as an aspect of "cause in fact"); Keeton et al., *supra*, § 41 (same); Restatement (Third) of Torts, *supra*, § 27 & cmt. f (treating limitations on the construction of "sufficient causal sets" as a facet of "factual cause").

requirements take a number of different forms, most can be described loosely as "difference-making" requirements. The question posed by these requirements is not, of course, whether the defendant's contribution *actually* made a difference. To require proof that the defendant's contribution actually made a difference would be to require proof of but-for causation. The question posed by these secondary requirements is, instead, essentially whether the defendant's contribution "might have made a difference." Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* 164 (1987) (describing the causation test applied to contributions by accomplices).

Under the Brown Commission test, for example, and under the state statutes derived from it, a defendant's contribution will not qualify as a cause if "the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient." *Final Report of the National Commission on Reform of Criminal Laws*, *supra*, § 305; *see also* Ala. Code § 13A-2-5(a); Ark. Code § 5-2-205; 17-A Me. Rev. Stat. § 33; N.D. Cent. Code § 12.1-02-05; Tex. Penal Code § 6.04. Under this test, a defendant's contribution will qualify as a cause if it satisfies either of two difference-making tests. First, it will qualify as a cause if it might *actually* have made a difference – if the other causal factors at work were not "clearly sufficient" to cause the result. Alternatively, it will qualify as a cause if, in the absence of the other causal factors, it might still have caused the

result – if it was not "clearly insufficient" to cause the result.

The first of these two difference-making tests corresponds, as it happens, to what the courts require by way of difference-making in the lost-chance homicide cases. Again, the lost-chance cases require proof that the defendant's conduct contributed to, or complemented, the causal mechanism behind the victim's death. *See* Johnson, *supra*, 91 Iowa L. Rev. at 77-78, 106. But they also require proof that "the victim *might* have survived but for the defendant's conduct." *See id.* at 104; *see also, e.g., Armstrong*, 502 P.2d at 444 (relying on evidence that "in the absence of any one of the factors in this case, the victim might have survived"). To require proof that the victim might have survived but for the defendant's conduct is to require proof, as the Brown Commission's first test does, that the other causal factors at work in the case were not "clearly sufficient" by themselves to cause the death. *See Final Report of the National Commission on Reform of Criminal Laws*, *supra*, § 305.

Not all courts, though, have required proof that the defendant's contribution "might" have made a difference. Some have required only proof that the defendant's contribution was "substantial" rather than trifling. *See* LaFave, *supra*, § 6.4(b) at 469. In California, for example, the courts require the government, first, to prove that the defendant's conduct *contributed* to the result – that the conduct "was operative at the moment of the [result] and acted with another cause to produce the [result]." *Jennings*,

237 P.3d at 496 (quoting Cal. Jury Instr. 3.41). But they also require the government to prove that the defendant's contribution was a "substantial factor." *Id.* As the phrase "substantial factor" implies, this version of the difference-making requirement disqualifies as causes those contributions that are "insignificant or merely theoretical." *Id.*; *see also* Perkins & Boyce, *supra*, at 781; *Wells*, 355 N.W.2d at 107 (Levin, J., dissenting).[8]

This Court need not decide in this case whether to adopt one or another (or none) of these difference-making requirements. For starters, Burrage has not raised or briefed this question. In the district court and in his petition for certiorari, Burrage appears to have taken the position that the criminal law invariably requires but-for causation. J.A. 238; Pet. for Cert. 15-16. And in his brief to this Court, Burrage's only argument on the subject of factual cause is that an overdetermining cause must be "independently" sufficient in order to count as a cause. Pet. Br. 18, 31. Because Burrage has neither raised nor briefed the difficult question whether the criminal law imposes one or another of these difference-making

---

[8] The Restatement (Third) of Torts takes yet another approach to the question of difference-making. It limits the kinds of counterfactual manipulation that are permitted to the finder of fact in constructing a "sufficient causal set" of which the defendant's contribution is a necessary element. *See* Restatement (Third) of Torts, *supra*, § 27 & cmt. f.

requirements, this Court should leave the question for another case.

Further, none of these difference-making requirements would have changed the outcome of Burrage's trial. The evidence at Burrage's trial showed that heroin was the only drug in Banka's blood that was present (or present in the form of metabolites) at greater than therapeutic levels. J.A. 157, 194. The evidence also showed that morphine, a heroin metabolite, was present in Banka's blood at about two-and-a-half times the highest therapeutic level. J.A. 153. This evidence leaves no doubt as to whether the heroin supplied by Burrage was a substantial – as opposed to a trifling or insubstantial – factor in Banka's death from mixed-drug intoxication. And it leaves no doubt as to whether the heroin deprived Banka of a chance of surviving the other drugs. *See Neder v. United States*, 527 U.S. 1, 18 (1999) (holding that an instructional error pertaining to the elements of an offense is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL C. GERAGHTY
Attorney General of Alaska
RICHARD SVOBODNY
Deputy Attorney General
ERIC A. JOHNSON*
Special Assistant
Attorney General
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600
ejohnsn@illinois.edu

Counsel for Amici Curiae

**Counsel of Record*

Dated: OCTOBER 8, 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 26 2013
OFFICE OF THE CLERK

No. 12-7515

IN THE
Supreme Court of the United States

MARCUS ANDREW BURRAGE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MARY PRICE
VICE PRESIDENT AND
GENERAL COUNSEL
FAMILIES AGAINST
MANDATORY MINIMUMS
1100 H Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, Pennsylvania 19003
(610) 649-8200

GREGORY G. RAPAWY
Counsel of Record
CAITLIN S. HALL
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(grapawy@khhte.com)

July 26, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT .....

I. THE RULE OF LENITY SHOULD BE APPLIED RIGOROUSLY TO MANDATORY MINIMUM SENTENCING STATUTES 6

A. The Rule of Lenity Helps Avoid the Costs of Overreading Mandatory Minimums 7

B. The Risk of Courts Overreading Mandatory Minimums Is Particularly High ... 12

II. THE RULE OF LENITY SUPPORTS THE CONSTRUCTION OF 21 U.S.C. § 841(b)(1)(C) URGED BY THE PETITIONER IN THIS CASE 15

A. The Statute Is At Least Ambiguous as to Whether the Government Must Prove But-For Causation 15

B. The Statute Is At Least Ambiguous as to Whether the Government Must Prove Proximate Causation 25

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

ACandS, Inc. v. Asner, 686 A.2d 250 (Md. 1996) 23

Albernaz v. United States, 450 U.S. 333 (1981)..... 6

Alleyne v. United States, 133 S. Ct. 2151 (2013) 9

Begay v. United States, 553 U.S. 137 (2008)..... 7

Bell v. United States, 349 U.S. 81 (1955)..... 6

Bendectin Litig., In re, 857 F.2d 290 (6th Cir. 1988)..... 23

Bifulco v. United States, 447 U.S. 381 (1980)..... 6

Busic v. United States, 446 U.S. 398 (1980) 8

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. 1993)..... 18

Campbell v. State, 444 A.2d 1034 (Md. 1982)..... 20

Chapman v. United States, 500 U.S. 453 (1991)..... 14

Commonwealth v. Root, 170 A.2d 310 (Pa. 1961)..... 20

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630 (2011) 26, 29

Dean v. United States, 556 U.S. 568 (2009)..... 7, 12

Dorsey v. United States, 132 S. Ct. 2321 (2012) 14

Eversley v. State, 748 So. 2d 963 (Fla. 1999) 18

Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996)..... 18

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) 19

Harris v. United States, 536 U.S. 545 (2002)..... 9

Hartman v. Moore, 547 U.S. 250 (2006)..... 19

Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992) 26

Jones v. United States, 526 U.S. 227 (1999) 25, 31

Ladner v. United States, 358 U.S. 169 (1958)..... 6, 21

M.S., In re, 896 P.2d 1365 (Cal. 1995) 18

Menne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988)..... 23

Neal v. United States, 516 U.S. 284 (1996)..... 9

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003) 24

Paroline v. United States, No. 12-8561 (cert. granted June 27, 2013)..... 24

People v. Kibbe, 321 N.E.2d 773 (N.Y. 1974) 20

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 19

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) 29

Sherwood Bros., Inc. v. District of Columbia, 113 F.2d 162 (D.C. Cir. 1940) 25

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 25-26

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994) 23

Sykes v. United States, 131 S. Ct. 2267 (2011) 14

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011) 24, 26

United States v. Bass, 404 U.S. 336 (1971).....7, 8, 31

United States v. De La Cruz, 514 F.3d 121 (1st Cir. 2008) 27

United States v. Granderson, 511 U.S. 39 (1994) 8

United States v. Guillette, 547 F.2d 743 (2d Cir. 1976) 28

United States v. Hargrove, 714 F.3d 371 (6th Cir. 2013) 24

United States v. Harris, 701 F.2d 1095 (4th Cir. 1983) 28

United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010) 21

United States v. Hayes, 589 F.2d 811 (5th Cir. 1979) 28

United States v. Houston, 406 F.3d 1121 (9th Cir. 2005) 28

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013) 24

United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011) 24

United States v. Lanier, 520 U.S. 259 (1997) 9

United States v. Main, 113 F.3d 1046 (9th Cir. 1997) 27

United States v. Marler, 756 F.2d 206 (1st Cir. 1985) 28

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) 28

United States v. McIntosh, 236 F.3d 968 (8th Cir. 2001) 27

United States v. Monnier, 412 F.3d 859 (8th Cir. 2005) 21

United States v. Monzel, 641 F.3d 528 (D.C. Cir.), *cert. denied*, 132 S. Ct. 756 (2011) 24, 26

United States v. O'Brien, 130 S. Ct. 2169 (2010) 14

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994) 27

United States v. R.L.C., 503 U.S. 291 (1992) 6, 8

United States v. Robinson, 167 F.3d 824 (3d Cir. 1999) 27

United States v. Santos, 553 U.S. 507 (2008) 12, 31

United States v. Spinney, 795 F.2d 1410 (9th Cir. 1986) 26, 28

United States v. Walls, 80 F.3d 238 (7th Cir. 1996) 29

United States v. Webb, 655 F.3d 1238 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1131 (2012) 28

United States v. Williams, 51 F.3d 1004 (11th Cir. 1995) 28

United States v. Woodlee, 136 F.3d 1399 (10th Cir. 1998) 28

United States v. Yeaman, 194 F.3d 442 (3d Cir. 1999) 28

University of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) 16, 17, 18, 19

Van Houten v. State, No. 50657-9-I, 2003 WL 22766074 (Wash. Ct. App. Nov. 24, 2003) 23

Watson v. United States, 552 U.S. 74 (2007) 14

STATUTES, REGULATIONS, AND RULES

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ..... 4, 13, 14

21 U.S.C. § 841 25

21 U.S.C. § 841(b)(1) 17, 21

21 U.S.C. § 841(b)(1)(C) 1, 4, 5, 6, 13, 15, 19, 20, 25, 27, 28, 29

Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii) 14

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* 29

18 U.S.C. § 924(c)(1) 14

18 U.S.C. § 2259 24

18 U.S.C. § 3553(a) 8, 12

18 U.S.C. § 3553(e) 11

Sentencing Guidelines § 2K2.1(c) 29

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

132 Cong. Rec. 22,991 (Sept. 11, 1986) 30

132 Cong. Rec. 26,436 (Sept. 26, 1986) 13

132 Cong. Rec. (Sept. 27, 1986):

p. 26,728 30

p. 26,731 30

p. 26,823 30

132 Cong. Rec. (Sept. 30, 1986):

p. 27,173 30

p. 27,177 30

p. 27,183 30

132 Cong. Rec. (Oct. 8, 1986):

p. 29,610 30

p. 29,624 30

132 Cong. Rec. 30,477 (Oct. 14, 1986) 13

132 Cong. Rec. 32,722 (Oct. 17, 1986) 30

ADMINISTRATIVE MATERIALS

United States Sentencing Comm'n:

Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (Nov. 2004), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm 10, 11

Report to the Congress: Federal Child Pornography Offenses (Dec. 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm 13-14

Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm 11, 13

Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991) 9, 11

OTHER MATERIALS

Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196 (1967) 3, 7

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 16, 17, 18, 22, 23, 26

Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf..... 10

Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003).....16, 19, 26, 27

Model Penal Code (1985) 27

Herbert L. Packer, *The Limits of the Criminal Sanction* (1968)..... 9

Restatement (Second) of Torts (1965)..... 18

Restatement (Third) of Torts: Liability for Physical & Emotional Harm (2010) 18

1 Paul H. Robinson, *Criminal Law Defenses* (1984) 16

INTEREST OF *AMICUS CURIAE*[1]

Amicus Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

This case is important to FAMM for two reasons: the specific statute at issue, and more general principles that apply to all mandatory minimum sentencing statutes. The court of appeals and the government have adopted an interpretation of 21 U.S.C. § 841(b)(1)(C) that departs from traditional understandings of causation-in-fact and of proximate cause. By doing so, they have increased the likelihood that individual defendants will be subjected to lengthy, mandatory, and essentially arbitrary prison sentences based on events for which they cannot properly be held responsible under the law.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent were filed contemporaneously with this brief.

In addition to the opportunity to correct that harmful misinterpretation of the law, this case offers this Court an excellent vehicle to reaffirm the important role of the rule of lenity in the context of a particularly extreme mandatory minimum sentencing statute. As FAMM's members are keenly aware, the exact boundaries of the mandatory minimums that apply to particular conduct often have an even greater impact on individual defendants' lives and liberty than do the boundaries of the lesser offenses that would otherwise apply to that conduct, but that are subject to ordinary, discretionary sentencing. Where, as here, the government seeks an innovative and expansive interpretation of a mandatory minimum, FAMM has a strong interest in advocating for rigorous judicial scrutiny.

INTRODUCTION AND SUMMARY

I. The rule of lenity has an important role to play in the interpretation of mandatory minimum sentencing statutes and should be given special force in cases that involve them. The reasons for that approach fall into two categories. *First*, the costs of erroneously broad interpretations of mandatory minimums – both to individual liberty and to the sentencing system as a whole – are particularly high. The costs of erroneously narrow interpretations, by comparison, are low. *Second*, the likelihood of error in construing mandatory minimums is particularly high, because such statutes often do not result from a considered drafting process.

A. The most obvious cost of overreading a mandatory minimum provision is the cost that it imposes on the liberty of the individual who is erroneously sentenced to a longer (often much longer) prison term than a correct reading of the law would

permit. Errors of that kind offend the courts' "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967). The aggravated offenses associated with mandatory minimums also impose a heightened stigma on the offender that should reflect a genuine legislative judgment rather than a mistake by an overzealous prosecutor or court.

In addition, mandatory minimums impose costs on the sentencing system by detracting from its fairness and proportionality. Errors in construing such statutes too broadly magnify those costs for no good reason. Even sentencing uniformity – the ostensible goal of mandatory minimums – often is poorly served by them, because they place enough power in the hands of prosecutors to invite inconsistent and arbitrary application. Applying the rule of lenity rigorously to such statutes reduces those systemic costs and ensures that they are incurred only when Congress has truly found them justified.

By contrast, construing a mandatory minimum too narrowly creates few problems that cannot be solved, or at least mitigated. Where a district court finds that the circumstances of a particular case justify a sentence as severe as the one prescribed by an inapplicable minimum, that court usually can impose an appropriate sentence in the exercise of its sentencing discretion. Moreover, where the courts err in narrowing a minimum further than Congress intended, the government is well situated to press for corrective legislation.

B. The risk of error is higher when courts interpret mandatory minimums because such statutes

often are written quickly and without due consideration. The Anti-Drug Abuse Act of 1986, which included the provision at issue here, provides a concrete example: It was passed as emergency legislation as a result of public concern about a small number of well-publicized deaths by overdose. In other cases as well, Congress has created mandatory minimum sentences that have enormous effects on future defendants with little consideration of their details. The rule of lenity provides a needed safeguard when those statutes turn out vague.

II. The rule of lenity should lead this Court to reverse the judgment of the court of appeals. Petitioner Burrage correctly argues that 21 U.S.C. § 841(b)(1)(C) should be read in his favor, even without the rule of lenity. If there is any residual doubt, however, lenity ought to dispose of it. A statute that provides for a decades-long sentence when "death . . . results from" drug use should not lightly be interpreted to eliminate the traditional requirements of cause-in-fact and proximate cause.

A. There is no doubt (or even dispute) that § 841(b)(1)(C) requires proof of causation-in-fact. Because the statute does not specify any particular standard for assessing causation, it should be read to incorporate the traditional common law requirement of but-for causation: the prohibited result would not have happened but for the defendant's conduct. Modern tort law has developed looser causation standards such as the "substantial factor" test, but this Court has been hesitant to depart from but-for causation even when interpreting civil statutes – much less criminal ones. In any event, the weight of authority holds that substantial-factor causation is a limited exception to ordinary but-for causation that

applies only in cases where multiple sufficient causes "overdetermine" the result of a particular harm. This case does not involve a jury finding of multiple sufficient causes – quite the contrary, the jury instructions did not ask whether Burrage's conduct was sufficient to cause death.

The "contributing cause" standard applied by the court of appeals is unmoored from the statutory phrase "death . . . results from." The government's suggestion in its opposition to certiorari that Burrage's conduct could be "combined" with the conduct of others to support a finding of but-for causation attempts to extend to criminal law a rule that has met with only limited acceptance even in its original context of tort law. That remarkable position would be unlikely to succeed even without invoking the rule of lenity. But as the government seeks to do all this without any grounding in the statutory text, lenity should be enough to decide the matter.

B. Section 841(b)(1)(C) also should be read to include the common law concept of proximate causation. Proximate cause is and should be read into every criminal statute unless Congress says otherwise, and Congress did not say otherwise here. The rule of lenity demands that Congress's silence be construed in favor of the criminal defendant, rather than against him.

ARGUMENT

I. THE RULE OF LENITY SHOULD BE APPLIED RIGOROUSLY TO MANDATORY MINIMUM SENTENCING STATUTES

A court may not "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). That principle – called the "rule of lenity" when applied to construe a statute – dictates that "doubts in the enforcement of a penal code [be resolved] against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. 81, 83 (1955). Consistent with that purpose, the rule applies "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States v. R.L.C.*, 503 U.S. 291, 306 (1992) (plurality opinion).[2]

There are particularly good reasons to apply the rule of lenity rigorously to statutes that, like 21 U.S.C. § 841(b)(1)(C), create aggravated offenses with mandatory minimum sentences. Those reasons come both from comparing the *costs* of error in favor of severity to the costs of error in favor of lenity and from the heightened *risk* of error in construing mandatory minimum provisions.

---

[2] *See also Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("[T]he Court has made it clear that [the rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (same).

A. The Rule of Lenity Helps Avoid the Costs of Overreading Mandatory Minimums

The costs of erroneously construing mandatory minimum sentencing provisions too broadly are especially high, and the costs of construing them too narrowly are especially low. These "interpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions." *Dean v. United States*, 556 U.S. 568, 584-85 (2009) (Breyer, J., dissenting).

1. The most direct cost of reading a mandatory minimum too broadly is that individual defendants lose their liberty. Mandatory minimum provisions are, by design, severe. They often tie an additional prison sentence of years or (as here) decades to a single factual determination. Such provisions therefore speak to the core concern that has motivated courts to apply the rule of lenity for centuries: an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967), *quoted in United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Begay v. United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment) (advocating application of the rule of lenity to avoid "condemn[ing] a man to a minimum of 15 years in prison on the basis of . . . speculation").

Further, mandatory minimum provisions often are said to reflect (at least in theory) a moral judgment that particular conduct deserves harsher punishment. In our system of government, that type of judgment is reserved to the legislature. The rule of lenity ensures that criminal sentences actually reflect legislative judgment, rather than the views of

a court filling in the blanks. *See United States v. Granderson*, 511 U.S. 39, 69 (1994) (Kennedy, J., concurring in the judgment) ("'[b]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity,' and set the punishments therefor") (quoting *Bass*, 404 U.S. at 348); *see also R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment).[3]

Any criminal statute raises these concerns to some extent, but mandatory minimum provisions do so with particular urgency. Unlike other criminal laws, such provisions run counter to the principle that courts should "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of criminal punishment, 18 U.S.C. § 3553(a), based on the facts of a particular case. A mandatory minimum is thus a congressional directive to ignore injustice in individual cases in light of a perceived need for greater deterrence or incapacitation across the board. Congress may choose to make that tradeoff (within constitutional bounds), but it is the duty of the courts to ensure that Congress has actually done so before imposing needlessly harsh punishments. *Cf. Busic v. United States*, 446 U.S. 398, 408-09 (1980) (refusing to interpret a sentencing enhancement based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

---

[3] Justice Kennedy did not find it necessary to apply the rule of lenity to construe the mandatory minimum provision in *Granderson* but stated that he would have done so if the statute had not already been clear in the defendant's favor. *See* 511 U.S. at 69 (Kennedy, J., concurring in the judgment).

2. The adverse consequences of erroneously expanding mandatory sentencing beyond the limits of congressional intent do not affect individual defendants alone. Such errors strike at the foundations of the sentencing system by undermining "sentencing proportionality – a key element of sentencing fairness." *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne v. United States*, 133 S. Ct. 2151 (2013). As the Sentencing Commission – quoted with approval by this Court – has explained: "'The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.'" *Neal v. United States*, 516 U.S. 284, 291-92 (1996) (quoting United States Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* iii (Aug. 1991) ("*1991 Report*")).[4]

Further, the rule of lenity historically has been justified in part based on the "principle of legality" – the rule that conduct can be criminalized, and penalties authorized, only by legislative action, so "that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits." Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968); *see United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Mandatory minimum provisions raise that concern more than other criminal statutes, because they transfer sentencing

---

[4] The Commission has further described "mandatory minimum [as] both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve." *1991 Report* 26.

discretion from the trial judge, "the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way," to "an assistant prosecutor not trained in the exercise of discretion." Anthony M. Kennedy, Address at the American Bar Association Annual Meeting at 5 (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

Inconsistently exercised discretion means that in practice mandatory minimums fail to yield even *uniformity* in sentencing – the benefit that they are supposed to produce at the expense of individual justice and proportionality. The Sentencing Commission found in 2004 that "[r]esearch over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply." United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 89 (Nov. 2004) ("*Fifteen-Year Report*"), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm.[5] Earlier in the guidelines era,

> the Commission [had] reported that, among all offenders who engaged in conduct that qualified them for a mandatory minimum sentence, only

---

[5] The Commission found that there was "little empirical research exploring why enhanced penalties are sought in some cases and not in others," but noted that "[f]ield research has reported that defense counsel believe the existence of penalty enhancements that are applicable at the sole discretion of the government gives prosecutors tremendous bargaining power to encourage defendant cooperation and discourage zealous defense advocacy." *Fifteen-Year Report* 90.

> 74 percent were initially charged with a count carrying the highest mandatory penalty applicable to their conduct. Only sixty percent were ultimately convicted and sentenced at this penalty level or above.

See id. (citing *1991 Report* 56-58). Even after conviction, prosecutors have wide discretion to request "substantial assistance" departures from mandatory minimums. *See* 18 U.S.C. § 3553(e). In 2010, 25.8% of all offenders convicted of an offense carrying a mandatory minimum penalty were relieved of the penalty at least in part because of an exercise of this discretion.[6]

As a result, rigorous application of the rule of lenity to mandatory minimums promises to protect important rule-of-law values as well as the interests of individual defendants. Those values face a greater threat from mandatory minimums that have unclear boundaries and are uncertain in their application. Problems of overly discretionary and inconsistent application exist even for mandatory minimums that are "relatively straightforward." *Fifteen-Year Report* 89. Such problems are still worse where reasonable lawyers and judges disagree about the facts that may trigger a mandatory minimum sentence.

---

[6] *See* United States Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 133 & fig. 7-8 (Oct. 2011) ("*2011 Report*"), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. The 25.8% figure includes 18.5% who benefited from a substantial assistance motion alone and 7.3% who both benefited from such a motion and qualified for statutory "safety valve" relief.

3. By contrast, the costs of erroneously construing a mandatory minimum provision too narrowly are relatively low, both for individual cases and for the criminal justice system as a whole. In cases that fall outside the scope of a mandatory minimum, but that nevertheless feature aggravating circumstances similar to those that moved Congress to impose the minimum, a sentencing judge still has discretion (guided by § 3553(a) and by the sentencing guidelines) to impose a more severe sentence. As Justice Breyer explained in *Dean v. United States,* "an interpretive error on the side of leniency[] still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*." 556 U.S. at 584 (Breyer, J., dissenting).

Moreover, "an error that excludes (erroneously) a set of instances Congress meant to include . . . could lead the Sentencing Commission to focus on those cases . . . [and] make available to Congress a body of evidence and analysis that will help it reconsider the statute." *Id.* at 585. Those who bring actions under the criminal laws (the executive branch) have far greater access to those who create them (the legislative branch) than do those who defend against such actions (potential criminal defendants). In light of this practical reality, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

B. The Risk of Courts Overreading Mandatory Minimums Is Particularly High

The risk of mistaking congressional intent also is unusually high in the case of mandatory minimum provisions, because they often do not originate from a

careful and considered drafting process. The process that led to passage of the Anti-Drug Abuse Act of 1986 – which created the "death . . . results from" provision of 21 U.S.C. § 841(b)(1)(C) – is a good example. The Act was hastily introduced in June 1986, shortly after the well-publicized overdose death of a popular athlete. *See infra* p. 30 & n.23. As the Sentencing Commission has explained, "the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically [led] Congress [to] bypass[] much of its usual deliberative legislative process. As a result, Congress held no committee hearings and produced no reports related to the 1986 Act." *2011 Report* 23-24 (footnote omitted).

The predictable result of addressing complex legal issues "on an emergency basis," 132 Cong. Rec. 26,436 (Sept. 26, 1986) (statement of Sen. Hawkins), was unclear language, even in critical provisions. In one example from the Act, Senator Levin pointed out that proposed language for a new capital sentencing provision left in doubt whether a particular fact was an element of the capital offense or whether its absence was a mere mitigating factor. *See id.* at 30,477 (Oct. 14, 1986) (statement of Sen. Levin) ("It simply goes to the point that that is what hearings are all about.").[7]

---

[7] An example from another statute is the mandatory five-year sentence that Congress created in 2003 for knowing *receipt* of child pornography, while creating no mandatory minimum sentence for the "closely related offense" of possession. United States Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 28 (Dec. 2012) (discussing the "sparse" legislative history available to explain this disparity and noting that "[n]o legislative findings, committee reports, or relevant floor statements by sponsors clearly reflect Con-

The Anti-Drug Abuse Act is, unfortunately, not the only criminal statute that imposes mandatory minimum sentences on the basis of language that could have used more consideration. Others recently considered by this Court include the "Delphic residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), which Justice Scalia has called a "drafting failure" that should be declared "void for vagueness," *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting); and the "unclear" 30-year mandatory minimum for possessing a machinegun in furtherance of certain crimes, *United States v. O'Brien*, 130 S. Ct. 2169, 2176 (2010), to which this Court applied a five-factor test to determine whether it was meant as an offense element or as a sentencing factor. Even where Congress has spoken with relative clarity, its decisions in this area have been forcefully criticized as lacking forethought and deliberation.[8] A decision from this

---

gress's reasons for the different penalties"), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm.

[8] *See, e.g.*, *Dorsey v. United States*, 132 S. Ct. 2321, 2328 (2012) (describing the "strong[] critici[sm]" from the "[Sentencing] Commission and others in the law enforcement community" over "two decades" that led Congress to change the 100 to 1 ratio between mandatory minimum sentences involving crack cocaine and powder cocaine); *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring in the judgment) (characterizing the Court's interpretation of 18 U.S.C. § 924(c)(1), under which "trading a gun for drugs" triggers a five-year mandatory minimum but "trading drugs for a gun" does not, as making "scant sense"); *Chapman v. United States*, 500 U.S. 453, 468 (1991) (Stevens, J., dissenting) (persuasively, though unsuccessfully, contending that "[t]he consequences of the majority's construction of 21 U.S.C. § 841 are so bizarre that I cannot believe they were intended by Congress").

Court reaffirming that the rule of lenity should be applied rigorously to mandatory minimums thus not only would protect strong interests in individual liberty, but also would provide needed clarity in the many close cases that arise under these statutes.

II. THE RULE OF LENITY SUPPORTS THE CONSTRUCTION OF 21 U.S.C. § 841(b)(1)(C) URGED BY THE PETITIONER IN THIS CASE

Petitioner Burrage ably sets forth in his brief the reasons why the jury instructions in this case cannot be reconciled with the best construction of 21 U.S.C. § 841(b)(1)(C). FAMM fully supports those arguments and agrees that this Court can and should reverse the judgment of the Eighth Circuit in this case without resorting to the rule of lenity. Part II of this brief gives additional reasons that, at the very least, the "death . . . results from" language of § 841(b)(1)(C) cannot be read to foreclose Burrage's position that the government was required to prove traditional causation in both the but-for and the proximate sense. As a result, the rule of lenity requires that the statute be read to incorporate those well-established requirements of the common law. The jury's finding that Burrage's sale of one gram of heroin "played a part" in the death of Joshua Banka from a mixed-drug overdose does not meet those requirements and therefore does not support Burrage's conviction of an aggravated offense with a 20-year mandatory minimum sentence.

A. The Statute Is At Least Ambiguous as to Whether the Government Must Prove But-For Causation

By its terms, § 841(b)(1)(C) imposes a causation requirement. The 20-year minimum sentence at

issue here applies only if "death or serious bodily injury results from the use" of a controlled substance. As the Solicitor General agreed in opposing certiorari, this language requires the government to prove (at least) that the controlled substance "was a cause-in-fact of the death." Opp. 16. The district court's instruction to the jury – that it need only determine that the heroin "played a part" in Banka's death to find petitioner liable for the aggravated offense, JA 241-42 – did not describe cause-in-fact as it is known by the criminal law.

1. "Causation-in-fact" is the requirement, common to tort and criminal law, that an action be a "factual cause" of a result before the actor can be held liable for that result. It is widely understood to require "but-for" causation – which is to say that the result would not have occurred without the cause. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265 (5th ed. 1984) ("Prosser & Keeton"). Indeed, the two terms are largely treated as synonymous.[9] As this Court explained at the close of the last Term, "[i]t is . . . textbook . . . law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (quoting Prosser & Keeton § 41, at 265). That "is the background against which

---

[9] *See, e.g.*, Wayne R. LaFave, *Substantive Criminal Law* § 6.4(a), at 466 (2d ed. 2003) ("LaFave") ("the defendant's conduct must be the 'but-for' cause (sometimes called the 'cause in fact') of the forbidden result"); 1 Paul H. Robinson, *Criminal Law Defenses* § 88(b), at 456 (1984) ("[I]t must be shown that the defendant's conduct physically caused the required result in the sense that the result would not have come about 'but for' his conduct. This is sometimes referred to as the 'cause in fact' requirement.") (footnote omitted).

Congress legislate[s]" in enacting any statute that creates civil or criminal liability, including § 841(b)(1); and, accordingly, common law but-for causation is "the default rule[]" that Congress "is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.*

Modern tort law recognizes a limited exception to this rule. In the "rare" case where "an injured party can prove the existence of multiple, *independently sufficient* factual causes," *id.* (emphasis added; internal quotation marks omitted) – so that all defendants would be absolved of tort liability if a strict "but-for" test were applied – a plaintiff may prevail by instead demonstrating that the defendant's conduct was a "substantial factor" in causing the harm. Prosser & Keeton § 41, at 267-68. Substantial-factor causation is a policy measure that responds to the problem of "overdetermin[ation]." *Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting).[10] Where multiple *sufficient* conditions for a result exist, none is a *necessary* condition. Thus, to avoid leaving an injured plaintiff without compensation, courts will treat one or more sufficient conditions as causes-in-fact.

Leading authorities support the application of the "substantial factor" test as an exception to traditional but-for causation only where multiple sufficient

---

[10] The majority and the dissent in *Nassar* disagreed vehemently about whether the substantial-factor test should apply in cases of employment discrimination. But the dissent made clear its view that the substantial-factor test applies where "two forces create an injury each alone would be sufficient to cause." 133 S. Ct. at 2546 (Ginsburg, J., dissenting). Even in that civil, remedial context, no member of this Court suggested that the substantial-factor test should apply to alleged retaliation without proof that the discrimination was independently sufficient to give rise to adverse employment action.

conditions for a harm exist. The Second Restatement of Torts takes this view explicitly.[11] Prosser and Keeton similarly describe the multiple-sufficient-cause scenario as the "one type of situation in which [the but-for test] fails." Prosser & Keeton § 41, at 266. The highest courts of several states are in accord.[12]

---

[11] Restatement (Second) of Torts § 432 (1965) ("(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."). The recently published Third Restatement takes a similar approach, *see* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 27 (2010), but appears to contemplate broader liability in at least some cases, *see id.* cmt. f. Whether or not this Court might find that broader approach persuasive in tort cases (though *Nassar* suggests otherwise), it has no place in criminal law. *See infra* pp. 19-21.

[12] *See, e.g.*, *Eversley v. State*, 748 So. 2d 963, 967 (Fla. 1999) ("Although deceiving at first glance, this is not a case where two causes, each alone sufficient to bring about the harmful result, operated together to cause the result. Therefore, the 'substantial factor' test does not apply."); *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996) ("substantial factor" test does not substitute for but-for causation "*except* where two causes concur to bring about the event, and either one of them, operating alone, would have been sufficient to cause the identical result") (internal quotation marks omitted); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. 1993) (*en banc*) ("the 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury"); *see also In re M.S.*, 896 P.2d 1365, 1385 (Cal. 1995) (Kennard, J., concurring) ("[C]onduct is deemed to be a 'cause in fact' of another's injury if either (1) the injury would not have occurred 'but for' the conduct, or (2) the conduct would have been sufficient to produce the injury in the absence of other independent forces operating concurrently.").

2. Even in the civil context, this Court has hesitated to incorporate "substantial factor" or "motivating factor" tests into federal law. For example, the Court has repeatedly rejected such innovative doctrines in cases where multiple factors (some permissible, some impermissible) combine to influence a decision subsequently challenged under anti-discrimination law. *See, e.g.*, *Nassar*, 133 S. Ct. at 2525; *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (reasoning that the ordinary meaning of the phrase "because of" connotes but-for causation); *Hartman v. Moore*, 547 U.S. 250, 260 (2006) ("If there is a finding that retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind.").[13] Thus, even if § 841(b)(1)(C) were a tort statute, the government would face an uphill battle to show that the statute could impose liability without but-for causation.

In any event, § 841(b)(1)(C) is not a tort statute – it is a criminal one. That distinction is important because, "with crimes, . . . the consequences of a determination of guilt are more drastic," and it is therefore "arguable that a closer relationship between the result achieved and that intended or hazarded should be required." LaFave § 6.4(c), at 472.[14] Tort law, moreover, has a variety of features

---

[13] *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) ("What we term 'but-for' cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. . . . Any standard less than but-for . . simply represents a decision to impose liability without causation.").

[14] State courts frequently acknowledge this point, most often in discussions of different tort and criminal standards for *prox-*

that mitigate the unfairness of asking a defendant to compensate the plaintiff for a result that would have occurred without the defendant's action. Those include mechanisms for allocating costs among multiple liable parties (contract); for shifting risk entirely (insurance); for avoiding duplicative judgments (joint and several liability); and for preventing recovery by a plaintiff who brings about his own injury (comparative fault). Petitioner has no comparable safeguards against an unjust result.

There thus is ample support for a reading of § 841(b)(1)(C)'s 20-year mandatory minimum provision that would require the government to prove traditional but-for causation beyond a reasonable doubt: that is, but for the use of drugs sold by the defendant, a drug user who died would have lived. Alternately, this Court might conclude that, in cases with multiple independently sufficient causes for a drug overdose, proof that a particular drug was a "substantial factor" in death or injury would suffice. Both of those standards are well-established in the law as tests for causation and are reasonable interpretations of the term "results from." Any argument that Congress meant to impose a more permissive

---

imate causation. *See, e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041 (Md. 1982) ("[T]he tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide. . . . Tort law is primarily concerned with who shall bear the burden of loss, while criminal law is concerned with the imposition of punishment."); *People v. Kibbe*, 321 N.E.2d 773, 776 (N.Y. 1974) (recognizing that criminal standard of proximate cause "is greater than that required to serve as a basis for tort liability"); *Commonwealth v. Root*, 170 A.2d 310, 312 (Pa. 1961) ("Legal theory which makes guilt or innocence of criminal homicide depend upon such accidental and fortuitous circumstances as are now embraced by modern tort law's encompassing concept of proximate cause is too harsh to be just.").

test, however, would be "based on no more than a guess as to what Congress intended," *Ladner*, 358 U.S. at 178, and therefore inconsistent with the rule of lenity.

3. The jury instruction given in this case, and approved by the court of appeals, was that the heroin Banka bought from Burrage needed only to be a "contributing cause" of Banka's death, which meant only that it must have "played a part" – however minor – in that death. *See* JA 59-60, 241-42. The court of appeals took this formulation from its earlier opinion in *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), which in turn appears to have borrowed the "played a part" language from the definition of "contributing cause" in *Black's Law Dictionary*. *See id.* How the court of appeals derived the "contributing cause" standard from the actual statutory language – which requires a "death" that "results from" use of drugs – is wholly unclear from either *Burrage* or *Monnier*.

Nor was there any basis in precedent for the "played a part" instructions. Confronted in *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010), with apparently identical jury instructions – that the use of a drug "need not be the primary cause of death or serious bodily injury," but "must at least have played a part in the death or in the serious bodily injury," *id.* at 947 – Judge Posner remarked that "[n]o case ha[d] approved the language" of the instruction. *Id.* at 950. That was true in 2010, when *Hatfield* was decided, and it certainly was true 24 years earlier, when Congress enacted § 841(b)(1). So far as we can tell, then, the standard under which Burrage was convicted and sentenced does not have its origin in any of the traditional tools of statutory construction. The rule of lenity (and the closely related principle of

legality) should have prevented the court of appeals from inventing it.

4. In his opposition to the petition for certiorari, the Solicitor General defended the judgment of the court of appeals on broader grounds than the court itself gave. He argued that

> [t]he law has long understood how to address the conduct of multiple actors whose "combined conduct, viewed as a whole, is a but-for cause of the [harm]": When "application of the but-for rule to [each of the actors] individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm]."

Opp. 16 (quoting Prosser & Keeton § 41, at 268) (alterations added in government's brief). Calling this formula something that courts have "long understood" is a considerable overstatement. The quotes in the above excerpt are from Prosser & Keeton § 41, at 268, which is the only authority the government cites for its argument. Those authors caution, however, that, as of the time they published the fifth edition of their casebook in 1984, "*no judicial opinion* ha[d] approved this formulation," though they believed the reported cases could be reconciled with it. *Id.* at 268 n.40 (emphasis added).[15] That was the state of the law in 1986, when Congress enacted the statutory language here.

In the intervening 29 years, it does not appear that Prosser and Keaton's formulation has been applied to determine liability in a single criminal case. In the

---

[15] It is indeed unclear from the treatise whether Prosser and Keeton even meant their proposed formula to apply outside the multiple-sufficient-causes scenario, which they had earlier described as the "one type of situation" in which traditional but-for causation failed to work properly. *See supra* p. 18.

tort context, the Sixth and Tenth Circuits explicitly have rejected the standard in diversity cases, holding that there *cannot* be liability on a combined-conduct theory without proof that a particular defendant's conduct would independently have been sufficient to cause a plaintiff's harm. *See In re Bendectin Litig.*, 857 F.2d 290, 310-11 (6th Cir. 1988) (applying Ohio law: "plaintiffs . . . still have to prove 'but for' causation rather than some weaker . . . standard"); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1459-61 & n.9 (10th Cir. 1988) (applying Nebraska law: refusing to apply the test on the ground that it was a deviation from the common law that Nebraska had not "adopted").[16]

The combined-conduct theory of causation has been considered in a handful of tort cases, but applied in few. It has gained a foothold primarily in the context of asbestos cases, where several state courts have found defendants liable where a plaintiff may have become ill as a result of exposure to the products of multiple manufacturers.[17] To the extent these cases

---

[16] *See also Van Houten v. State*, No. 50657-9-I, 2003 WL 22766074, at *1-2 (Wash. Ct. App. Nov. 24, 2003) (unpublished) (judgment noted at 119 Wash. App. 1027) (rejecting a jury instruction based on the "combined cause" language from Prosser & Keeton because it was "not an accurate statement of the law" and "obliterate[d] the necessary link between negligence and causation").

[17] *See, e.g., Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858-60 (Iowa 1994) (permitting proof of proximate cause based on "a reasonable inference of exposure to a defendant's asbestos-containing product, coupled with expert testimony regarding asbestos fiber drift and the cumulative effects of exposure to asbestos") (internal quotation marks omitted); *ACandS, Inc. v. Asner*, 686 A.2d 250, 259-60 (Md. 1996) (discussing problems of proof in a multiple-manufacturer asbestos case).

do not require proof that a particular manufacturer's product independently could have caused a plaintiff's injury, they are best explained as attempts "to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis," *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003), and do not support loosened causation requirements in criminal law.[18]

A theory of causation that would permit the government to imprison Burrage for 20 years on the ground that his conduct was one of "multiple factors [that] caused Banka's death," Opp. 17 – without proving that Burrage's unlawful conduct was either a necessary *or* a sufficient condition for Banka's death

---

[18] Two circuit courts recently have applied a combined-conduct standard of causation in cases involving statutory awards of restitution for child pornography. *See United States v. Hargrove*, 714 F.3d 371, 373-75 (6th Cir. 2013); *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012), *cert. dismissed*, 133 S. Ct. 1521 (2013). Those courts were motivated by a desire to comply with "the congressional purpose," manifested in 18 U.S.C. § 2259, "of ensuring full compensation of losses for the victims of child pornography distribution and possession." *Kearney*, 672 F.3d at 99; *accord Hargrove*, 714 F.3d at 375. Thus, although *Kearney* and *Hargrove* were criminal cases, their adoption of a relaxed tort-law standard for causality was grounded in the same underlying purpose of compensation as the tort cases from which that standard derived. They represent, moreover, the minority view. *See, e.g., United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir.) ("Monzel's possession of Amy's image . . . was not 'sufficient in itself' to produce all of [her injuries], nor was it 'essential' to all of them. . . . Monzel's possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses."), *cert. denied*, 132 S. Ct. 756 (2011); *accord United States v. Aumais*, 656 F.3d 147, 154-55 (2d Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011). The Court recently granted certiorari to resolve this split. *See Paroline v. United States*, No. 12-8561 (cert. granted June 27, 2013).

– would be an unprecedented innovation in the criminal law. There is no reason for this Court to assume that Congress had such a theory in mind when it enacted § 841. In these circumstances, the rule of lenity forecloses the government's argument that "causation in part" is enough.

B. The Statute Is At Least Ambiguous as to Whether the Government Must Prove Proximate Causation

Section 841(b)(1)(C) also is at least ambiguous concerning whether the government must prove that the drug distributed by a defendant was the proximate cause of a death. There is no dispute that the jury here was not asked for such a finding.

1. The court of appeals – along with the other circuit courts that have sided with the government on this issue – determined that § 841(b)(1)(C) did not necessitate a finding of proximate cause because its requirement that "death . . . result[] from the use" did not explicitly demand one. That rule overlooks the point that "statutory drafting occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts." *Jones v. United States*, 526 U.S. 227, 234 (1999); *see also Sherwood Bros., Inc. v. District of Columbia*, 113 F.2d 162, 163 (D.C. Cir. 1940) (finding it "reasonable . . . to assume" that, where a common law rule "has become embedded in the habits and customs of the community, . . . Congress had the common-law rule in mind when it legislated"). That rule applies here because, under the common law, proximate causation is a fundamental requirement for *all* crimes.

Proximate cause is "causation substantial enough and close enough to the harm to be recognized by law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704

(2004). It is a term used "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) – "shorthand" for the concept that "not all factual causes contributing to an injury should be legally cognizable causes," because, "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond,'" *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011) (plurality opinion) (quoting Prosser & Keeton § 41, at 264).

So understood, proximate cause is a fundamental requirement of criminal statutes. *See* LaFave § 6.4, at 464 ("[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result."). Proximate cause is so enshrined in the structure of criminal law that it often is treated not as an element of any particular offense, but as a "bedrock rule . . . that a defendant is only liable for harms he proximately caused." *Monzel*, 641 F.3d at 535 (collecting sources from both tort and criminal law).[19]

For this reason, courts frequently presume that criminal statutes require proof of proximate cause, even in the absence of statutory language confirming the requirement. *See, e.g., id.* at 536 (holding that proximate cause applies in the "absence of contrary

---

[19] *Accord Aumais*, 656 F.3d at 153; *see also United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986) ("A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.").

direction" from Congress) (internal quotation marks omitted); *United States v. Main*, 113 F.3d 1046, 1050 (9th Cir. 1997) (finding it irrelevant that the statute prohibiting involuntary manslaughter "does not expressly mention proximate cause" because that concept is "implicit in the common understanding of the crime"). Respected commentators also have strongly defended the rule that proximate cause is and should be an element even of so-called "strict liability" offenses such as felony murder.[20]

2. As the court of appeals and the Solicitor General have noted, there is circuit authority that concludes that § 841(b)(1)(C)'s "death ... results from" provision does not incorporate proximate cause as an element of the offense. *See* JA 58 & n.4; *see also* Opp. 12 (collecting cases). That authority is strikingly unpersuasive. Each case that has reached this conclusion relies on nothing more than the "plain language" of § 841(b)(1)(C) and the decisions of other courts of appeals on the same issue.[21] Equally

---

[20] *See, e.g.*, Model Penal Code § 2.03 explanatory note, p. 26 (1985) (describing proximate causation, in the context of "strict liability offenses," as "a minimal protection against the limitless extrapolation of liability without fault"); LaFave § 6.4(h), at 494-95 ("It has sometimes been claimed, perhaps because the felony-murder and misdemeanor-manslaughter rules border on strict liability, that the only ca[us]al relationship which must be established in such cases is cause-in-fact, which ordinarily only requires proof that but for the defendant's acts (here the felony or misdemeanor) the harm would not have occurred. . . . This is not so.").

[21] *See, e.g.*, *United States v. De La Cruz*, 514 F.3d 121, 137 (1st Cir. 2008) (relying on "the language of the statute" and decisions of other courts); *United States v. Robinson*, 167 F.3d 824, 830-31 (3d Cir. 1999) (similar); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) ("plain language" alone); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) ("plain

striking is another fact: Except for the Eighth Circuit itself, each of the circuits to adopt an interpretation of § 841(b)(1)(C) that excludes proximate cause – purportedly based on its "plain language" – has interpreted similar language in at least one other statute to incorporate a proximate-cause requirement.[22]

---

language" and other decisions); *United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005) (similar); *United States v. Webb*, 655 F.3d 1238, 1250-54 (11th Cir. 2011) (per curiam) (similar), *cert. denied*, 132 S. Ct. 1131 (2012).

[22] *See, e.g.*, *United States v. Marler*, 756 F.2d 206, 216 (1st Cir. 1985) ("common law meaning" dictates that "if death results" means that defendant may be held liable for deaths "proximately caused by his criminal conduct" – those that are "foreseeable and naturally result") (internal quotation marks omitted); *United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999) (plain meaning of "harm that resulted" requires showing of causation akin to "reasonabl[e] foreseeab[ility]"); *United States v. Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) ("if death results" requires finding that "death ensued as a proximate result" of the defendant's actions); *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979) (same as *Marler*); *Spinney*, 795 F.2d at 1415-16 (9th Cir.) (construing "misdemeanor resulting in death" to require "pro[of] that the defendant's conduct was the legal or proximate cause of the resulting injury"); *United States v. Woodlee*, 136 F.3d 1399, 1405-06 (10th Cir. 1998) ("if bodily injury results" requires showing that "injury was a foreseeable result" of the defendant's conduct); *United States v. Williams*, 51 F.3d 1004, 1012 (11th Cir. 1995) ("[i]f death resulted" element satisfied where defendant "put into motion" a chain of events that contained an "inevitable tragic result") (internal quotation marks omitted). The Second, Sixth, and Seventh Circuits, which have not addressed whether § 841(b)(1)(C) requires proximate cause, also have concluded that similar language in other statutes does incorporate such a requirement. *See United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) ("We find the principle of proximate cause embodied in [18 U.S.C.] § 241 through the phrase 'if death results.'"); *United States v. Martinez*, 588 F.3d 301, 317-19 (6th Cir. 2009)

3. This Court's recent decision in *CSX Transportation, Inc. v. McBride* is the exception that proves the rule. There, this Court held that the Federal Employers' Liability Act ("FELA"), which makes railroads liable for injuries to their employees "'resulting in whole or in part'" from the railroad's negligence, does not incorporate common law proximate causation. 131 S. Ct. at 2634 (quoting 45 U.S.C. § 51). Instead, FELA permits liability for negligence that "played any part . . . in . . . causing [an] injury." *Id.* at 2641 (internal quotation marks omitted; alterations in original).

McBride rejected the contention that FELA incorporated common law proximate cause for three reasons: (1) because FELA's unusual "resulting in whole or in part" language indicated Congress's intent to depart from common law standards, *see id.* at 2636; (2) because Congress had intended to permit broad recoveries for employees engaged in the "exceptionally hazardous" railroad business in the early twentieth century, *id.*; and (3) because this Court's earlier decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), was entitled to *stare decisis* effect, *see* 131 S. Ct. at 2640-41. No similar concerns are present here. If anything, it would be odd to give the unadorned term "results" of § 841(b)(1)(C) the same meaning as the unusual phrase "resulting in whole or in part."

4. Finally, to the extent that it is relevant, the legislative history of § 841(b)(1)(C) contains no

---

("[P]roximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death.'"); *United States v. Walls*, 80 F.3d 238, 241 (7th Cir. 1996) ("resulting in death" under Sentencing Guidelines § 2K2.1(c) requires a finding that death was a "foreseeable" result).

indication whatsoever that Congress meant to depart from the general rule that proximate cause is an element of any crime that involves bringing about a prohibited result. Instead, that history shows that Congress was uniquely occupied with cases that presented no particular problems of proximate cause: overdose deaths of popular athletes from use of a single drug.[23] Accordingly, here the text is not only

---

[23] *See, e.g.*, 132 Cong. Rec. 22,991 (Sept. 11, 1986) ("The tragic death of Maryland basketball star Len Bias underscored the reality of drug use on our college campuses.") (statement of Rep. Waxman); *id.* at 26,728 (Sept. 27, 1986) ("[I]t took the tragic and unnecessary deaths of two promising young athletes to finally inspire this Nation to act on the drug problem.") (statement of Sen. Bingaman); *id.* at 26,731 ("S. 2787 also imposes prison terms of 20 years to life for drug trafficking where, as in the Len Bias case, death results.") (statement of Sen. D'Amato); *id.* at 26,823 ("[t]he American people are tired of hearing about athletes dead from overdoses") (statement of Sen. Hollings); *id.* at 27,173 (Sept. 30, 1986) ("Due to the recent death of several well-known Americans, including Len Bias, drug abuse has come to the forefront of public concern.") (statement of Sen. Bradley); *id.* ("Recent events have highlighted the scope and seriousness of the drug problem and dramatized the need for swift and forceful action. Athletes like Len Bias and Don Rogers have lost their lives in the growing epidemic of cocaine abuse.") (statement of Sen. Kennedy); *id.* at 27,177 ("The deaths of several well-known athletes have convinced everyone that the consequences of illicit drug use can be fatal or disabling.") (statement of Sen. Dodd); *id.* at 27,183 ("And this summer, the people of Boston grieved as a star player who had just signed with the Boston Celtics, Len Bias, lost his life to an overdose of cocaine. So we all know that there is a serious problem with drug addiction in our society.") (statement of Sen. Kerry); *id.* at 29,610 (Oct. 8, 1986) ("The death of Len Bias, a promising young athlete at the University of Maryland, focused our attention on drug abuse among athletes.") (statement of Rep. Florio); *id.* at 29,624 ("The deaths of prominent athletes due to drug use . . have all raised this issue to the national spotlight.") (statement of Rep. Daub); *id.* at 32,722 (Oct. 17, 1986) ("Unfortunately,

the best, but also the only evidence of Congress's intent with regard to proximate cause. Because the text is silent on that question, the default presumption is dispositive.

In sum, even before taking the rule of lenity into account, this case can be resolved by the "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones*, 526 U.S. at 234. At best, the government's contrary theory is open to serious doubt, and in a criminal case "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 348. This Court should follow the rule of lenity and reject the government's argument that petitioner should spend 20 years in prison when Congress has "not clearly prescribed" that punishment. *Santos*, 553 U.S. at 514 (plurality opinion).

CONCLUSION

The court of appeals' judgment should be reversed.

I guess, it took the very widely publicized death of basketball star, Len Bias, and football star, Don Rogers, to bring the issue to where it is now, that is, the No. 1 domestic concern of the American people.") (statement of Rep. Oxley).

Respectfully submitted,

MARY PRICE
VICE PRESIDENT AND
GENERAL COUNSEL
FAMILIES AGAINST
MANDATORY MINIMUMS
1100 H Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, Pennsylvania 19003
(610) 649-8200

GREGORY G. RAPAWY
Counsel of Record
CAITLIN S. HALL
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(grapawy@khhte.com)

July 26, 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 26 2013
OFFICE OF THE CLERK

No. 12-7515

In The
Supreme Court of the United States

MARCUS ANDREW BURRAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

JONATHAN D. HACKER
Co-Chair, Supreme Court
Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5285

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319
cline@johndclinelaw.com

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to" death by "mixed drug intoxication," but was not the independent cause of death of a person.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT HAS REPEATEDLY INTERPRETED GENERAL CAUSAL TERMS IN CIVIL STATUTES TO REQUIRE BOTH ACTUAL CAUSE AND PROXIMATE CAUSE 5

II. THE RULE OF LENITY REQUIRES DOUBTS ABOUT "RESULTS FROM" TO BE RESOLVED IN DEFENDANT'S FAVOR 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Anza v. Ideal Steel Supply Corp.,
547 U.S. 451 (2006) 7

Associated General Contractors v. California State Council of Carpenters,
459 U.S. 519 (1983) 5, 6, 11

CSX Transportation, Inc. v. McBride,
131 S. Ct. 2630 (2011) 7, 8, 9

Exxon Co. v. Sofec, Inc.,
517 U.S. 830 (1996) 2

Hemi Group, LLC v. City of New York,
559 U.S. 1 (2010) 7

Holmes v. SIPC,
503 U.S. 258 (1992) 6, 7, 11

United States v. Gradwell,
243 U.S. 476 (1917) 11

United States v. Houston,
406 F.3d 1121 (9th Cir. 2005) 7

United States v. McIntosh,
236 F.3d 968 (8th Cir. 2001) 7

United States v. Monzel,
641 F.3d 528 (D.C. Cir.), *cert. denied*,
132 S. Ct. 756 (2011) 9

United States v. Pineda-Doval,
614 F.3d 1019 (9th Cir. 2010) 9, 10

United States v. Santos,
553 U.S. 507 (2008) 11, 12

United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 3, 10

STATUTES AND RULES

15 U.S.C. § 15 5
18 U.S.C. § 1964(c) 6, 7
21 U.S.C. § 841(b)(1)(C) ..... *passim*
Sup. Ct. R. 37.2(a) 1
Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Wayne R. LaFave, *Substantive Criminal Law* § 6.4 (2d ed. 2003) 2, 9
W. Prosser, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 3

INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular relevance here, NACDL has filed amicus briefs in a number of cases in which it has urged that the rule of lenity be

---

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

applied to limit the lower federal courts' expansive interpretation of broadly worded federal criminal statutes.

SUMMARY OF ARGUMENT

1. This Court has not had occasion to interpret the causal element of a federal *criminal* statute. But it has often construed the causal elements of *civil* statutes. It uniformly interprets such elements to require both actual (or "but-for") cause and proximate (or "legal") cause, unless the language and structure of the statute shows an unambiguous contrary intent. Reading statutes to require proximate cause is necessary, the Court has found, to avoid "extreme results," given the potentially unlimited scope of "but-for" causation. *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996).

2. The presumption of proximate cause that this Court affords civil statutes applies even more powerfully to criminal statutes. As a leading treatise puts it, where a criminal offense requires proof of "a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003). Nothing in the text, structure, or history of the statute at issue here--21 U.S.C. § 841(b)(1)(C)--supports a deviation from this basic principle of criminal law.

3. Even if doubt remained about the scope of the "results from" element of § 841(b)(1)(C), the rule of lenity would require that the statute be read

to require proximate cause. This Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings of a criminal statute, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. The rule of lenity requires that any doubts about the scope of § 841(b)(1)(C) be resolved in petitioner's favor.

ARGUMENT

This Court has recognized in the civil context that "proximate causation principles are generally thought to be a necessary limitation on liability." *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996). Requiring only "but-for" causation "would produce extreme results," because "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Id.* (quoting W. Prosser, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 264 (5th ed. 1984)).

An example based on the statute at issue here--21 U.S.C. § 841(b)(1)(C)--illustrates the danger of a "but-for" causation standard. Suppose A sells a small quantity of heroin to stranger B, a first-time user. B discovers that he enjoys the drug. He becomes an addict and buys ever-larger quantities from persons unconnected to A. Several years later he overdoses and dies.

It could be argued that A's sale of heroin to B was a "contributing cause" of B's death--that is, in the words of the instruction the Eighth Circuit approved here, "a factor that, although not the primary cause, played a part in the death." JA 241-42. If A had not sold B heroin, B would not have discovered that he enjoyed the drug, would not have become addicted, would not have overdosed, and would not have died. If a jury followed this reasoning to find that A's sale to B was a "contributing cause" of B's death, A would face a mandatory 20-year prison sentence and potential life in prison.

Few would maintain that Congress intended such an unjust outcome when it included the "death . . . results from" provision in § 841(b)(1)(C). Before a court could read the statute to permit such a draconian result, Congress would have to speak unambiguously. It did not do so in § 841(b)(1)(C). To the contrary, under ordinary rules of statutory interpretation--rules this Court applies to construe causal terms in *civil* statutes--the phrase "results from" includes both "but-for" cause and proximate cause. And because this is a *criminal* case, with a man's liberty at stake, any doubt about the meaning of the phrase must be resolved in petitioner's favor under the rule of lenity.

I. THIS COURT HAS REPEATEDLY INTERPRETED GENERAL CAUSAL TERMS IN CIVIL STATUTES TO REQUIRE BOTH ACTUAL CAUSE AND PROXIMATE CAUSE.

The Court has not had occasion to interpret the causal element of a federal *criminal* statute. But it has often construed the causal element of *civil* statutes--and its interpretation of those statutes leaves no doubt that § 841(b)(1)(C) must be construed to require both "but-for" cause and proximate cause.

In *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court interpreted § 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefor . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15 (emphasis added). The issue was whether the plaintiff Union had alleged a cognizable antitrust injury.

The Court acknowledged that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. But after reviewing the statute's history and interpretation by the lower courts, the Court found it "plain" that the question before it "cannot be answered simply by reference to the broad language of § 4. Instead, as was required

in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535. The Court drew an analogy between the antitrust standing question before it and "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause.'" *Id.* It held that, despite the statute's broad language, the Union had not alleged a cognizable antitrust injury. *Id.* at 546.

In *Holmes v. SIPC*, 503 U.S. 258 (1992), the Court applied a similar analysis to the causal element of the civil RICO statute. That statute affords treble damages to "any person injured in his business or property *by reason of*" a RICO violation. 18 U.S.C. § 1964(c) (emphasis added). The Court recognized that "this language can, of course, be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." 503 U.S. at 265-66 (footnote omitted).

The Court declined to read the statute so broadly. Noting that the language did not "compel" the conclusion that the statute required only "but-for" cause, it observed that "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading." *Id.* at 266

(footnote omitted).[2] The Court found that § 1964(c) required proof of proximate cause, as well as "but-for" cause. It concluded that "because the alleged conspiracy to manipulate did not proximately cause the injury claimed, SIPC's allegations and the record before us fail to make out a right to sue petitioner under § 1964(c)." *Id.* at 276; *see also Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17-18 (2010) (holding RICO plaintiff did not satisfy the *Holmes* proximate cause requirement); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-61 (2006) (same).

The Court's decision in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), provides an instructive contrast to these cases. In *CSX Transportation*, the Court held that the phrase "resulting in whole or in part from the [railroad's] negligence" in the Federal Employers' Liability Act did not incorporate a traditional proximate cause requirement. *Id.* at 2634. Much like the "contributing cause" instruction at issue here, the instruction the Court approved in *CSX Transportation* permitted liability if the defendant's negligence "played a part--no matter how small--in bringing about the injury." *Id.* at 2636 (quoting instruction). The Court based this interpretation on

---

[2] This textual analysis in *Holmes* and similar cases refutes the conclusion of some courts of appeals that the "results from" language unambiguously excludes a proximate cause requirement. *See, e.g., United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001). The key language in § 841(b)(1)(C) does not unambiguously exclude proximate cause any more than the language of the Clayton Act and RICO that the Court construed in *Associated General Contractors* and *Holmes*.

"FELA's language on causation," which is "as broad as could be framed," and the statute's "humanitarian and remedial goals." *Id.* (quotations and brackets omitted).

Against this interpretation, CSX argued that proximate cause "is a concept fundamental to actions sounding in negligence" and that the "any part" instruction "opens the door to unlimited liability . . . inviting juries to impose liability on the basis of 'but for' causation." *Id.* at 2641.[3] The Court found these concerns overstated, because under FELA foreseeability--a touchstone of proximate cause--is an aspect of the *negligence* element. In addition, the statute limits the universe of potentially compensable injuries to "those sustained by employees, during employment," thus "weed[ing] out the injuries most likely to bear only a tenuous relationship to railroad negligence." *Id.* at 2643-44.

A comparison with FELA confirms that § 841(b)(1)(C) must be interpreted to include proximate cause. First, the key statutory phrase--"results from"--lacks the expansive "in whole or in part" language that Congress included in FELA. Second, absent a proximate cause requirement, § 841(b)(1)(C) does not require that the death be foreseeable to the defendant--unlike FELA, which incorporates foreseeability through the negligence

---

[3] In dissent, Chief Justice Roberts, joined by Justices Scalia, Kennedy, and Alito, would have interpreted FELA to require a showing of proximate cause. *CSX Transportation*, 131 S. Ct. at 2644-51. Under the dissent's analysis, proximate cause would even more clearly be required under § 841(b)(1)(C).

element. Third, nothing in § 841(b)(1)(C) limits the universe of potential victims and thus "weeds out the [deaths] most likely to bear only a tenuous relationship" to use of drugs sold by the defendant. Finally, as discussed in the next part, § 841(b)(1)(C) is a criminal statute that must be strictly construed, not a compensatory, "humanitarian" statute designed to make injured railroad workers whole.

II. THE RULE OF LENITY REQUIRES DOUBTS ABOUT THE MEANING OF "RESULTS FROM" TO BE RESOLVED IN THE DEFENDANT'S FAVOR.

The previous discussion shows that, in the context of civil statutes, this Court reads causal elements to require proximate cause unless--as in *CSX Transportation*--the language and structure of the statute show an unambiguous contrary intent.

That interpretive approach--in effect, a presumption of proximate cause--applies even more clearly to criminal statutes. As a leading treatise puts it, where a criminal offense requires proof of "a specified result of conduct, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003); *see, e.g., United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011) (proximate cause is "a bedrock rule of both tort and criminal law") (footnote omitted), *cert. denied*, 132 S. Ct. 756 (2011); *United States v. Pineda-Doval*, 614 F.3d 1019, 1026 (9th Cir. 2010) (it is a "basic tenet of criminal law" that "when a criminal statute requires

that the defendant's conduct has resulted in injury, the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury") (quotation omitted). Nothing in the text, structure, or history of § 841(b)(1)(C) supports a deviation from this basic principle of criminal law.[4]

Under these principles, the "results from" phrase in § 841(b)(1)(C) includes both "but-for" cause and proximate cause. But even if doubt remained on this point, the rule of lenity would require that it be resolved in petitioner's favor. This Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings of a criminal statute, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. Under the rule of lenity,

> the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . . This venerable rule not only vindicates

[4] *Pineda-Doval* notes that the courts of appeals have created a "drug-trafficking" exception to the requirement of proximate cause. *See* 614 F.3d at 1027. There is no principled basis for such an exception to the usual proximate cause rule in criminal cases, and neither *Pineda-Doval* nor any other case offers one. Those cases purport to rely on the "plain language" of § 841(b)(1)(C), but they do not explain how virtually identical language can be read to *require* proximate cause in most statutes (such as the alien smuggling statute in *Pineda-Doval*) and unambiguously *exclude* it in § 841(b)(1)(C).

> the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion).

The rule of lenity "is founded on two policies that have long been part of our tradition," *United States v. Bass*, 404 U.S. 336, 348 (1971): that the law should provide fair warning of the line between criminal and noncriminal conduct, and that "legislatures and not courts should define criminal activity," which rests on "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotation omitted); *see, e.g., United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute.").

Here, the most that can be said for the court of appeals' view is that "[a] literal reading of [the phrase "results from"] is broad enough to encompass every [death] that can be attributed directly or indirectly to the consequences of" a defendant's drug

sales. *Associated General Contractors*, 459 U.S. at 529. But the Court did not find such a "literal reading" persuasive even in the context of the civil statutes in *Associated General Contractors* and *Holmes*, where the rule of lenity did not apply. In this criminal case, where "the tie must go to the defendant," *Santos*, 553 U.S. at 514, an interpretation that permits liability to rest solely on "but-for" cause must even more clearly be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery St.,
Suite 1070
San Francisco, CA 94104
(415) 322-8319

JONATHAN D. HACKER
Co-Chair, Supreme Court
Amicus Committee
National Association of
Criminal Defense Lawyers
1625 Eye St., NW
Washington, DC 20006
(202) 383-5285

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

July 2013